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Two of the western States furnish interesting examples of contempt of court. In a proceeding entitled *In re* Jones, before the Supreme Court of California, it was held that where a change of venue is not authorized by statute for bias, partiality or prejudice of a judge, it is a contempt of court to present an affidavit on an application for change of venue on that ground. In State v. Waugh, the Supreme Court of Kansas very properly hold as disrespectful, insulting and contemptuous, such language as the following, written and sent through the mail by the plaintiff in an action, to a trial judge, in a matter still pending before him: "I did not deem it necessary to go to you, with a body of friends and creditors, to impress upon you how important it was that I should have the money that was tied up by the garnishment * * * and exact of you a promise to rule in my favor. * * * I supposed that surely we would get some chance for hearing. I did not think it possible that our judge could be so warped by such a procedure as to entirely overlook the interests of a poor man, and ride over him roughshod, and decide in favor of a corporation. * * * Will you kindly help me, and inform me what I can do, that I may know that you are not the unjust judge that would not give a poor man the same chance that a bank has, and you will lift a load from my heart? And the most unkind act of all, when we had not even had a chance to be heard, was for you to allow an attorney to tax costs." Though the first mentioned case may be considered an instance of constructive or implied contempt merely, the latter is as clear a case of actual contempt as could well be imagined and the only regret is that the guilty party should have escaped with only a fine of fifty dollars.

The Supreme Court of Maine has, on the question of liability of carrier to one traveling on a free pass, preferred to follow the authority of New York, Massachusetts, Connecticut and New Jersey, rather than the courts of other States. In Rogers v. Kennebec Steamboat Co., the Maine court holds that one who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition, whether he reads it or not, and that such a contract, exempting a carrier from liability, is not prohibited by any rule of public policy in this State, and is effectual to exonerate the carrier from liability for the negligence of his servants. In so holding they followed Quinby v. Railroad Co., 150 Mass. 366, 30 Cent. L. J. 395; Wells v. Railroad Co., 24 N. Y. 181; Poucher v. Railroad Co., 49 N. Y. 263; Kinney v. Railroad Co., 32 N. J. L. 409; Griswold v. Railroad Co., 53 Conn. 371. These decisions are based upon the English rule which permits of such limitation of liability by a carrier. It cannot be said th t there is any established or prevailing American doctrine upon the question, for in Pennsylvania and in other States it is settled by a long course of decisions that a common carrier cannot limit his liability so as to cover his own or his servant's negligence. Some courts seek to distinguish the different degrees of negligence, and concede the right to make such exemption as to a free passenger in all cases of ordinary negligence, but decline to extend the doctrine to cases of gross negligence. Railroad Co. v. Read, 37 Ill. 484; Railroad Co. v. Mundy, 21 Ind. 48. And others refuse to give effect to any stipulation absolving the carrier from liability for any degree of negligence. Railroad Co. v. Henderson, 51 Pa. St. 315; Railroad Co. v. Curran, 19 Ohio St. 1; Jacobus v. Railroad Co., 20 Minn. 125, 18 Am. Rep. 360; Railroad Co. v. McGown, 65 Tex. 640. All the courts agree, however, that in the absence of any agreement to the contrary when a carrier has admitted a person to the rights of a passenger he owes him the same care and protection, when traveling on a free pass as when he has paid the usual fare. The result arrived at in the Maine case seems to be clearly in harmony with the principles of justice and common right. We are impressed with the force of the following language of Judge Whitehouse who delivered the opinion: "The term 'public policy' or 'policy of the law,' suggests but a vague and uncertain principle, and sometimes seems to be invoked as authority for a decision when a more definite reason

cannot readily be assigned. In what manner the public welfare or the safety of human life is involved, or any of the cherished interests of the law are invaded, by allowing one out of a hundred passengers to travel on a pass at his own risk, does not clearly and satisfactorily appear. In most instances, it is believed, free passes are solicited by the traveler, not proffered by the carrier. The fact that a gratuitous passenger must travel at his own risk will surely operate as an incentive to greater care and caution on his part, and tend to diminish the number of passes issued. The probability that the cases of free transit will be so numerous as to induce any relaxation of the rules of prudence and vigilance on the part of the carrier is too remote to have weight as argument. He is constantly, and, it would seem, sufficiently, reminded of his obligations to the public, in the most forcible and effectual manner, by the numerous claims and large verdicts in favor of those injured who travel for hire."

NOTES OF RECENT DECISIONS.

GARNISHMENT—PERSON SUBJECT TO PROCESS—WRONGFUL ARREST—WARRANT.—The Supreme Court of Alabama decides in Cunningham v. Baker, 16 South. Rep. 68, that where a police officer illegally arrests a person, and takes possession of his money and effects, these are not subject to garnishment in the hands of such officer by a creditor of the person arrested, there being no contractual relation between the officer and such person and that a telegram from a chief of police outside the State to one within, to see the conductor of an approaching train, and "keep track of B and P, swindling commission merchants," does not authorize the arrest of B and P. Brickwell, C. J., says in part:

It is obvious that, under the statute and under prior judicial decisions, a garnishment has a dual office. The one is, and the one in which it is more usually employed, the subjection of a debt, or of a demand originating in contract, or moneys coming rightfully and legally into the possession of the garnishee, which it is a legal duty to pay to the debtor of the creditor suing out the garnishment. The other is the subjection of moneys or effects in the possession or under the control of the garnishee, which it is a legal duty to deliver to the debtor. With the exception of cases of conveyances or transfers or agreements made to defraud creditors, a garnishment cannot be employed to reach or subject any debt or any demand the debtor, suing in his own name, cannot recover in an action *ex contractu*, or, as it is generally stated, in "an action of debt or *indebitatus assumpsit*." 1 Brick. Dig. p. 175, § 314, *et seq.* And, prior to the adoption of the present Code, the debt or demand must have been payable or solvable in money only. *Id.* p. 176, § 326; Jones v. Crews, 64 Ala. 368. The Code (sections 2945, 2946) enlarges the debts or demands which may be reached by garnishment. Not only debts or demands payable or solvable in money, but a liability "on a contract for the delivery of personal property, or for the payment of money which may be discharged by the delivery of personal property, or on a contract payable in personal property," is within the scope of the remedy. The liability must originate in, and be dependent on contract. This remains as essentially the controlling element and characteristic of the remedy as it was when debts or demands payable or solvable in money only were within its scope. If either of the several contracts to which the remedy is extended is broken, when the facts are ascertained the law fixes the measure of damages,—the value of the property at the time it should have been delivered or paid, with the interest on such value from that time. An unliquidated demand having in it no element of contract, or unliquidated damages, or the right of action for a tort, is not the subject of garnishment. 1 Freem. Ex'ns, § 167, and authorities cited.

The moneys and effects of the defendants in attachment, in the possession of the garnishee, were obtained from the defendants by taking them into custody, imprisoning them, and making search of their persons and trunks. The arrest, imprisonment, and search were without warrant; without any reason to believe that the defendants, or either of them, had committed, or intended the commission of, any offense against the law of this State. The only inducement or moving cause for it vouched by the garnishee was a telegram addressed to him as chief of police of the city of Montgomery by the chief of police of the city of New Orleans, requesting that he see the conductor of an approaching railroad train, "and keep track of Baker and Peterson, swindling commission merchants." The statute authorizes the policemen of an incorporated city or town, within the limits of the county, with or without warrant, to make arrests in all cases in which the sheriff is authorized to make them. Cr. Code, § 4260. As a general rule, at common law, an arrest could not be made without warrant. If a felony was committed, or a breach of the peace threatened or committed, within the view of an officer authorized to arrest, it was his duty to arrest without warrant, and carry the offender before a magistrate; or if a felony had been committed, and there was probable cause to believe a particular person was the offender, he could be arrested without warrant. Holley v. Mix, 3 Wend. 350; Burns v. Erben, 40 N. Y. 463. The matter of arrests is now the subject of a statutory regulation, largely affirmatory of the rules of the common law. Cr. Code, §§ 4260-4274. The statutes and the corresponding rules of the common law have primary, if not exclusive, relation to the administration of the criminal laws of the State. If an arrest be legal, under what conditions and for what purposes there may be a search of the person arrested, and what things found upon his person may be taken into possession by the officer making the arrest, were the subjects of very full and deliberate examination and exposition in *Ex parte* Hurn, 92 Ala. 102, 9 South. Rep. 515. A repetition of what is there said is not now necessary. A search of the person arrested is justifiable only as an incident to a lawful ar-

rest. If the arrest be unlawful, the search is unlawful, and is aggravated by the illegality of the arrest. If a person charged with treason, felony, or other crime in another State has fled therefrom, and is found in this State, the statutes provide for his apprehension and detention to await a requisition from the executive of the State in which the crime was committed. Cr. Code, §§ 4747-4760. Under these statutes, a warrant of arrest must issue from a magistrate having authority to issue such warrants. In the absence of statutes, upon common-law principles, the apprehension and detention of persons charged with crime in other States was effected through judicial officers, upon probable cause being shown by appropriate evidence. Morrell v. Quarles, 35 Ala. 544; 1 Kent, Comm. 36, 37. The intervention of a judicial officer and a warrant of arrest were deemed the more orderly, if not the only, course of legal procedure. The current of judicial decision supports the proposition that, when the matter of apprehension and detention is regulated by statute, the statutory mode of procedure must be observed, and that arrest and detention otherwise is illegal. Malcolmson v. Scott, 56 Mich. 459, 23 N. W. Rep. 166; State v. Shelton, 79 N. C. 605; *Ex parte* Cubreth, 49 Cal. 435; *Ex parte* Thornton, 9 Tex. 635; *In re* Heyward, 1 Sandf. 702; *In re* Leland, 7 Abb. Pr. (N. S.) 64; *In re* Rutter. *Id.* 67.

DIVORCE—DOWER—ALIMONY.—The effect of a decree of divorce in favor of a wife, barring her right of dower in the estate of her husband is one of the points discussed by the Supreme Court of Arkansas in Wood v. Wood, where a decree to that effect was upheld, though the divorce was given on account of the misconduct of the husband. The court says:

In allowing alimony the court decreed that it should be a "bar of all the plaintiff's right of dower in the estate of the said Henry Wood," her former husband. She insists that, the divorce not having been granted on account of her misconduct, the court erred in barring her total rights. But this is not true, unless she could have retained her right to dower after her divorce from the bonds of matrimony. She could not at common law. To entitle a party to dower, she must be the wife at the death of her husband. A divorce from the bonds of matrimony barred the claim of dower. Frampton v. Stepnens, 21 Ch. Div. 164; McCraney v. McCraney, 5 Iowa, 241; Gleason v. Emerson, 51 N. H. 405; Barrett v. Failing, 111 U. S. 525, 4 Sup. Ct. Rep. 598; Day v. West, 2 Edw. Ch. 596; Reynolds v. Reynolds, 24 Wend. 196; Walt v. Walt, 4 N. Y. 95; Co. Litt. L. 1 ch. 5, §§ 36, 32*a*; 3 Bl. Comm. 130; 4 Kent, Comm. 54; 2 Bish. Mar., Div. & Sep. § 1631.

But section 2578 of Mansfield's Digest provides: "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." This is a peculiar statute. Without undertaking to declare the rights of a divorced wife, the legislature declared by this section in what event she shall not be endowed. It is a copy of a New York statute without the enactment of the statutes of the State from which it was borrowed, which explained, and gave it vitality and effect in that State.

In Reynolds v. Reynolds, 24 Wend. 193, the origin and effect of this statute in New York is explained as follows: "By the statute, Westm. II. (13 Edw. I. ch. 34), it was enacted that 'if a wife willingly leave her husband, and go away, and continue with her advoutrer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action.' 2 Co. Inst. 433. This statute was, in substance, re-enacted in this State in 1787 (1 Greenl. St. 294, § 7), and it remained in force down to the revision of the laws in 1830. · · · In 1830 the act of 1787 was repealed, and, after declaring that a widow shall be entitled to dower, a new provision was made in the following words: 'In case of divorce in dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.' 1 Rev. St. 741, § 8. Under this statute the adultery is not enough. It must be followed by a divorce dissolving the marriage contract. This has brought us back to the common law as it stood before the statute of 13 Edw. I. for, as we have already seen, adultery did not work a forfeiture at the common law. And as to a divorce *a vinculo*, that always put an end to the claim of dower; for, although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband. Co. Litt. 32*a*; 2 Bl. Comm. 130; 2 Kent, Comm. p. 52*c*, and *Id.* p. 54. The statute bar for the mere act of adultery, which had existed for more than five centuries and a half, was blotted out by the repeal of the act of 1787, the British statutes not being in force in this State; and the eighth section of the act of 1830 has added nothing to the law as it would have stood had the legislature stopped with a simple repeal of the act of 1787."

In Wait v. Wait, 4 N. Y. 95, the court, overlooking Day v. West, 2 Edw. Ch. 592, and Reynolds v. Reynolds, 24 Wend. 193, "held that a judgment dissolving a valid marriage for the adultery of the husband did not cut off the wife's inchoate right to dower in lands of which he was at the date of the judgment, or theretofore had been, seised." In speaking of the decree dissolving the marriage in that case, the court said: "The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties, to the extent declared by statute. · · · It is true that the decree is that the marriage be dissolved, and that each party be freed from the obligations thereof. This dissolution and release, however, is not absolute. The wife, when the husband is the guilty party, is still entitled to her support; and the obligation of the marriage still rests upon the husband so far as to render it unlawful for him again to marry. When the wife is the guilty party, the marriage still continues in force so far as to give the husband a title to her property, and to render it unlawful for her to marry. As a further penalty for her offense, the legislature have declared that when the wife is convicted of adultery she shall not be entitled to dower in her husband's real estate."

Holding that a decree of divorce had no other effect than that declared by the statute, and finding that the dissolution of marriage by the decree was not absolute, but that the obligation of marriage, according to the statutes of New York, still rested upon the husband so far as to render it unlawful for him again to marry, the court rested its decisions in Walt v. Walt on the ground that the section which provided that, "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed," by denying a wife's right to dower when divorced for adultery, by fair implication saved it when a

divorce was granted for the adultery of the husband. This decision, even under the peculiar laws of New York, has been questioned. Moore v. Hegeman, 27 Hun, 70, affirmed 92 N. Y. 521; Price v. Price, 124 N. Y. 599, 27 N. E. Rep. 383; 2 Bishop. Mar., Div. & Sep. § 1635.

But there is no statute in this State limiting the dissolution of the marital ties to either party. Under the statutes the courts can impose on the husband the obligation to support the divorced wife by way of alimony, but in a divorce a *vinculo* the dissolution of the marriage is absolute. The common law in this respect is unrepealed. Here no *quasi* marital relation or condition exists, after a divorce from the bonds of matrimony has been granted, upon which the right to dower can attach. Under the statutes of this State the widow is only entitled to dower. It is true that the language of section 2578 of Mansfield's Digest indicate the opinion that the wife would be entitled to dower if the divorce should be granted on account of the misconduct of the husband, but, as said by Chief Justice Marshall in Postmaster General v. Early, 12 Wheat. 148, "a mistaken opinion of the legislature concerning the law does not make law." End. Interp. St. § 372.

SALE—FALSE REPRESENTATIONS—DUTY OF PURCHASER TO INVESTIGATE.—In Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 59 N. W. Rep. 1066, it was held that ordinarily one who buys property has a right implicitly to rely upon representations of the seller; and, if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer, by investigation, could have discovered their falsity. This was an action to recover the unpaid portion of the purchase price of a gas and electric light plant sold by plaintiff to defendant, defendant set up, as a counterclaim, damages sustained by it because of the deceit of plaintiff in making the sale. The alleged false representations related to the physical condition of the plant, its wires, poles, gas mains, and fixtures, and also the amount of its earnings the year previous to the sale, and the prices charged customers for gas and electric light. It was held that defendant was under no obligation to investigate the truth of such representations, and that, therefore, it was error for the court to charge the jury that, if the means were at defendant's hands to discover the truth or untruth of plaintiff's statement with respect to these matters, defendant must be presumed to have had knowledge of the actual facts, the only means at defendant's hands to discover the truth or falsity of the statements made being an investigation of such matters. It was also held further, that in actions for damages because of deceit in the sale of property the measure of damages is the difference between what the property would have been worth if as represented and what it actually was worth at the time of sale. Corliss, J., says:

In the course of his charge to the jury, the learned trial judge instructed them as follows: "If the means were at the defendant's hands to discover the truth or untruth of the plaintiff's statements with regard to the amount and character of the property, defendant must be presumed to have had a knowledge of the actual facts." This instruction must be considered in the light of the refusal of the court to charge the jury as follows, at the request of defendant's counsel: "If you find that, during the negotiations, statements were made by the plaintiff as to the earnings of the plant, the defendant had a right to rely upon these statements; and if they were so relied on, and were false, and the defendant suffered injury thereby, the defendant would be entitled to recover the damages which it suffered in consequence thereof." It is apparent from this refusal to charge, and from the charge as cited given, that the court told the jury that, as a matter of law, defendant did not have the right implicitly to rely upon the representations of the plaintiff touching the character of the plant, but must make inquiries concerning them, and must make investigation as to their truth and falsity. It is true that the word "investigate" is not used; but, when we consider the nature of the property and the character of the representations made it is obvious that something more than a mere inspection of an object present before a purchaser was necessary in order to enable the purchaser in this case to "discover" the truth or falsity of plaintiff's statements. Such a charge might be appropriate in an action in which fraud in the sale of a horse was set up, the seller having represented the horse to be perfectly sound, and it appearing that the horse stood before the purchaser at the time the representation was made, and that the only defect consisted in the absence of a leg, easily discernible by the ordinary use of the eyesight. But in the case at bar the means of discovering the truth or untruth of these false statements were not at hand in the sense that they must have been employed before the seller could be held responsible for his fraudulent representations; and, when this language was used, the jury must have drawn the inference from the fact that this plant was in the same city, and could be investigated with respect to its condition and its earnings, and the prices charged customers for gas and electric light, and with reference to the other features embraced in the statements made by plaintiff on the sale, that therefore the means were at hand, within the rule laid down by the court requiring the purchaser to discover at its peril the truth or falsity of the statements made. Such a rule of law would be unjust and intolerable. When parties deal at arm's length, the doctrine of *caveat emptor* applies; but the moment the vendor makes a false statement of fact, and its falsity is not palpable to the purchaser, he has an undoubted right implicitly to rely upon it. That would, indeed, be a strange rule of law which, when the seller had successfully entrapped his victim by false statements, and was called to account in a court of justice for his deceit, would permit him to escape by urging the folly of his dupe for not suspecting that he, the seller, was a knave. In the absence of such a suspicion, it is entirely reasonable for one to put faith in the deliberate

representations of another. The jury must have understood that the means were at hand to discover the claim, because the defendant might have measured the wire, counted the poles, examined the gas mains, ascertained how many customers were paying for gas and electric light, and might have hired an expert to examine into the earnings and expenses of the plaintiff in running the plant, with a view to discovering whether a business man had told the truth. It should not have been left to the jury to determine whether the means were at hand to discover the falsity of the statements made, in view of the character of such statements and the nature of the property sold. The defendant, as a matter of law, had a right to rely implicitly upon the statements made by plaintiff touching the character of this plant. So long as defendant did not actually know the representations to be false, it was under no obligation to investigate to determine their truth or falsity. In Mead v. Bunn, 32 N. Y. 280, the court say: "Every contracting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party and unknown to him, as a basis of mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." In Redding v. Wright (Minn.), 51 N. W. Rep. 1056 (a case very much in point), the court say: "If the representations were fraudulently made with the intent to induce the plaintiff to rely upon the fact being as represented, and to act upon the belief thus induced, the wrong-doer who succeeds in such a purpose is not to be shielded from responsibility by the plea that the defrauded party would have discovered the falsity of the representation if he had pursued such means of information as were available to him." While the rule has been in some cases stated in terms more favorable to plaintiff, yet no decision can be found which establishes a doctrine under which defendant would be bound, under the circumstances of this case, to make any investigation or inquiry touching the truth or falsity of the statements made in connection with the sale. There are many well-considered cases which sustain our view that defendant has a right implicitly to rely upon the representations made by plaintiff with respect to the character of the property to be purchased by defendant. In addition to the cases already cited, we refer to Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. Rep. 448; Gardner v. Trenary, 65 Iowa, 646, 22 N. W. Rep. 912; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. Rep. 755; McClellan v. Scott, 24 Wis. 81; Caldwell v. Henry, 76 Mo. 254; Oswald v. McGehee, 28 Miss. 340; Cottrill v. Krum, 100 Mo. 397, 13 S. W. Rep. 753; Campbell v. Frankern, 65 Ind. 591; Kerr, Fraud & M. 77. 80, 81; Erickson v. Fisher (Minn.), 53 N. W. Rep. 638; Alfred Shrimpton & Sons v. Philbrik (Minn.), 55 N. W. Rep. 551; Barndt v. Frederick (Wis.), 47 N. W. Rep. 6; Bigelow, Fraud, 522, 528. We are aware that cases can be found which exact from the buyer more care in ascertaining the truth or falsity of representations than the decisions just cited. These cases appear to us to have been rightfully decided, in view of the facts. In determining what the courts in such cases intended to hold, the language of each opinion must be read, in the light of the facts of the particular case. The unmistakable drift is towards the just doctrine that the wrong-doer cannot shield himself from liability by asking the law to condemn the credulity of his victim. The falsity of the statement may be apparent because the thing misrepresented is before the buyer, and the most casual look will suffice to discover the falsehood no artifice being used to divert his attention; or the statement may carry its own refutation upon its face, may be so absurd or monstrous that it is palpably false, as a statement by a person carrying on a business known to the purchaser to be very small that the receipts of the business are a million dollars a year. In these and other similar cases the law will not allow a person to assert that he was deceived. But the general rule is, and, upon principle, must be, that the question is one of reliance by the buyer upon the false statement of the seller. Whether it was wise for him to rely upon it, whether he was prudent in so doing, whether he is not chargeable with negligence in a certain sense in not investigating,—these inquiries are, in general, immaterial, provided the purchaser has in fact been deceived. The circumstances under which fraud is accomplished are so varied, the nature of the property and the character of the misrepresentations are so widely different, in different cases, that it is unwise to attempt to enunciate with precision a general rule by which all cases shall be governed. It is better to decide the cases as they arise, keeping in view the general principle that courts will not readily listen to the plea, that the defrauded party was too easily deceived. For this error in the charge, the judgment will be reversed, and a new trial granted.

CRIMINAL LAW — LARCENY BY HUSBAND FROM WIFE.—In Bearley v. State, 38 N. E. Rep. 35, decided by the Supreme Court of Indiana, it was held that if a husband takes his wife's personal property, under circumstances which, were he a third person, would constitute larceny, he is guilty of that crime. The court said, *inter alia:*

The main contention upon which appellant's counsel rely in their able brief is that husband and wife, living together as such, cannot steal one from the other; that to constitute a valid charge of larceny the indictment should show that at the time of the alleged crime they were living separate and apart, and that the taker then had neither the possession nor right to possession of the other's property. This is urged at great length with liberal quotations from the common law and sacred history, to the effect that husband and wife are one person, and hence incapable of larceny one from the other. Such was the law for ages, and so remains, unless overthrown by the legislative enactments of 1881 and prior thereto. By section 5324, Rev. St. 1881 (Burns' Rev. St. 1894, section 7289), marriage is declared to be a civil contract, into which males of the age of 18, and females of the age of 16, not under certain disabilities therein specified, are capable of entering. The only difference between it and other contracts is that marriage is the more priceless and sacred. By section 5115, Rev. St. 1881 (Burns' Rev. St. 1894, Sec. 6960), all the legal disabilities of married women to make contracts are abolished, except as further provided in the act of which it is a part. Section 5117, Rev. St. 1881 (Burns' Rev. St. 1894, Sec. 6962), provides that; "A married woman may take, acquire and hold property, real or personal, by conveyance, gift, device or descent, or by purchase with her separate means of money, and the same, together with all the rents, issues, income and profits thereof, shall be and remain her own separate property and under her own control, the

same as if she were sole and unmarried. As she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property; and she may also, in like manner, make any contracts with reference to the same," etc. The same section also provides that "she shall be bound by an estoppel *in pais*, like any other person." Section 5118, Rev. St. 1881 (Burns' Rev. St. 1894, Sec. 6963), binds a married woman by her covenants of title in conveyances of her separate property as if sole, and in like manner, as principal on her official bond. Section 5120, Rev. St. 1881 (Burns' Rev. St. 1894, Sec. 6965), makes all married woman liable for torts committed by them, and exempts the husbands from liability from the contracts or torts of their wives. Section 5130, Rev. St. 1881 (Burns' Rev. St. 1894, Sec. 6975), vests a wife with the earning or profits accruing from her separate trade or business. Section 5131, Rev. St. 1881 (Burns' Rev. St. 1894, Sec. 6976), empowers her to prosecute or maintain actions in her own name against persons for damages for injuries to her person or character, the same as if she were sole, and gives her the money so recovered. Prior to the enactment of the several sections of the statutes of this State, the common law fiction prevailed of the legal unity of husband and wife. In the eye of the law they were one person, and the husband was that person. In Blackstone's Commentaries (book 2, Sec. 433), the old rule is thus stated: "A · · · method of acquiring property in goods and chattels is by marriage, whereby those chattels which belonged formerly to the wife are by act of law vested in the husband, with the same degree of property and the same powers as the wife when sole had over them. This depends entirely on the notion of a unity of person between the husband and wife, it being held that they are one person in law, so that the entire being and existence of the woman is suspended during coverture, or entirely merged or incorporated in that of the husband; and hence it follows that whatever personal property belonged to the wife before marriage absolutely vested in the husband." The learned judge below held the indictment good upon the ground that the recent statutes gave the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts, and doing whatever a *feme sole* might do, and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficent statutes, a woman may hold her own property, make her own money, enter into her own contracts, pay her own debts. She may even contract with her own husband. If he defrauds her, she may recover. If a woman may contract, under these statutes, with her husband, and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that, if performed by another, it would constitute a felonious asportation. Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them. In Garrett v. State, 109 Ind. 527, 10 N. E. Rep. 570, the defendant was indicted for burning the property of "another person," to-wit, the property of Hannah Garrett. The evidence showed that he and his wife, Hannah, the owner of the dwelling house so destroyed, occupied, used and dwelt therein as their habitation, and yet this court said: "If a man unlawfully, feloniously, willfully and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute." Arson, as defined in our statute, is an offense against the property, as well as the possession. Larceny is also an offense against the right of private property, and, if the husband can commit the crime of arson against her private property, it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of the wife's goods. In our opinion, the judgment of the trial court should be, and it is, affirmed.

CONFLICT OF LAWS—INSOLVENT CORPORATION.—Among other points decided by the Supreme Court of Illinois in Warren v. First National Bank, 38 N. E. Rep. 222, it was held that a New York statute, forbidding the transfer of property, by corporations in contemplation of insolvency does not affect an assignment of a fraud in Illinois executed in Ohio by a New York corporation. On that point the court said:

If, then, the New York statute above quoted is to be enforced extraterritorially, the draft must be held to be void. Should it be so enforced? It is the charter alone which, by the law of comity, is recognized and enforced in other jurisdictions, and not the general legislation of the State in which the company is formed. The general laws and regulations of a State are intended to govern only within the limits of the State enacting them, and the State can have no power to give them extraterritorial force. Such provision does not, as a rule, enter into contracts made within the State, if they are to be performed in another jurisdiction. It follows, therefore, that where a State statute is enacted for the enforcement of a local policy only it will not be presumed that such statutory provisions were intended by the State, or by the shareholders forming the corporation, to enter into the charter contract, and to regulate the company in its transactions outside of the State, and they will not affect the validity of the dealings of the company in foreign States. 2 Morawetz, Priv. Corp. § 967. In White v. Howard, 38 Conn. 342, a question arose as to the power of a New York corporation to take a devise in the State of Connecticut, devises to corporations being forbidden by the New York Statute of Wills. The court, in sustaining the devise, said: "If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion contended for would be legal and logical. But the inability does not so arise. There is no prohibition in the charter. The inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills, and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take, created by the statute of a State, which is local, and a prohibitory clause in a charter, which everywhere cleaves to the corporation." In Ellsworth v. Railroad Co., 98 N. Y. 553, the corporation in question was organized under the laws of Illinois, and the point in dispute was whether a provision in its charter prohibiting it from selling its

bonds at less than 80 cents on a dollar, would apply, as a statutory provision, to a sale made in the State of New York. In deciding this question in the negative, the court said: "There is nothing in the laws of New York which renders the contract illegal. Even if the charter of the defendant should be so construed as to contain prohibitions which would have rendered the contract illegal in Illinois, if made there, they do not have that effect in this State." In Hoyt v. Shelden, 3 Bosw. 267, the charter of a corporation created by the laws of New Jersey contained no prohibition upon the disposition of its property in case of insolvency. A general statute of the State, however, prohibited incorporated companies, after becoming insolvent or in contemplation of insolvency, from selling, assigning or transferring any of their property or effects, and declared all such sales to be utterly null and void as against creditors. The question was as to whether the title of a citizen of New York, derived through a transfer of a portion of its property by such corporation, the transfer being made outside of New Jersey, was affected by such prohibition. The court in deciding that question in the negative, held that the power of disposing of its property was one of the powers incident to corporate existence, and was not destroyed by insolvency, unless so expressly provided in the act of incorporation, and that a citizen of New York, dealing with a New Jersey corporation, might rely upon the act of incorporation, and was not chargeable with notice of the general laws of New Jersey restraining the powers of corporations. See, also, National Bank of America v. Indiana Banking Co., 114 Ill. 493, 2 N. E. Rep. 401; Hoyt v. Thomson's Ex'r, 19 N. Y. 207. In view of these authorities, and of many others of like character which might be cited, we are of the opinion that the general statute of New York prohibiting the assignment or transfer of property by a corporation in contemplation of insolvency is only a part of the local law of that State, which New York corporations organized under the act of 1848 do not carry with them when they go to other jurisdictions to do business, and that, having no extra-territorial force, it has no application to an assignment of a fund in Illinois executed in Ohio by a New York corporation. In Starkweather v. Bible Soc., 72 Ill. 50, it was held that a New York corporation could not exercise a power in this State which was denied to it by the general statutes of the State of its creation, and to that extent the rule in this State must be held to be in conflict with that laid down in White v. Howard, *supra*. We are aware of no decision in this State, however, which holds that the local statutes of another State, regulating the mode in which corporate powers shall be exercised, or determining the validity of corporate acts performed in the exercise of such powers, are to be given any extra-territorial effect.

THE CHARACTER OF THE EVIDENCE REQUIRED TO CONVICT OF ADULTERY.

With regard to the nature of the evidence required to establish adultery it is evident that it must be, in most cases, circumstantial. Direct proof ought not to be required to sustain a charge of this character. But the person making so serious an accusation should be able to allege times and places, and to make proof of circumstances with some particularity, going to show the commission of the offense.[1] Concerning this, Lord Stowell[2] said, in a passage often quoted:[3] "It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable—it is very rarely indeed that parties are surprised in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books—at the same time it is impossible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a harsh and intemperate judgment moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning judging upon such things differently from what would strike the careful and cautious consideration of a discreet man." And Chief Justice Shaw thus notices the most usual of these circumstances: "Suppose, for instance, a married woman had been shown by undoubted proof to have been in an equivocal situation with a man not her husband, leading to a suspicion of the fact. If it were proved that she had previously shown an unwarrantable predilection for that man; if they had been detected in clandestine cor-

[1] Miller v. Miller, 20 N. J. Eq. 217; Bast v. Bast, 82 Ill. 584; Denison v. Denison, 30 Pac. Rep. 1100, 4 Wash. 705.

[2] At that time Sir William Scott.

[3] See Loveden v. Loveden, 4 Eng. Ecc. R. 461.

respondence, had sought stolen interviews, made passionate declarations; if her affection for her husband had been alienated; if it were shown that the mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose, then proof that such opportunity had occurred would lead to the satisfactory conclusion that the act had been committed. But when these circumstances are wanting; when there has been no previous unwarrantable or indecent intimacy between the parties, no clandestine correspondence, or stolen and secret interviews, the fact of opportunity and equivocal appearances would hardly raise a passing cloud of suspicion over the fair fame of such a woman."[4]

It seems then that while it is clearly not possible to lay down beforehand in a formal rule what circumstances shall and what shall not constitute satisfactory proof of the fact of adultery, yet the courts will not infer the guilt of the parties from the opportunity alone.[5] Proof that the parties were together in a place and at a time when and where it was possible for them to have been guilty is not sufficient, and this defect of proof is not supplied by proof that many years before the defendant had lived in concubinage with another man.[6] There must be evidence not only of the opportunity to commit the act, but also of the will to improve the opportunity.[7] Where both the opportunity for the act and the will to commit it are established the court will infer guilt.[8]

In an action for divorce on the ground of adultery it appeared that the rooms in which the parties were shown to have been together were the place of business of the plaintiff, and people went in and out there frequently; but there was no proof of a kiss, or an embrace, or a contact, a nearness of person, or an endearment of any kind or of a surprise in an equivocal situation, or of confusion of face on a sudden entrance, or anything clandestine in conduct, or which showed a desire for secrecy or concealment. Having reviewed the evidence and pointed out the absence of proof of the existence of these indications of guilt, the court said: "It is contrary to the usual experience of mankind, not only as gathered in one's own observation, but as disclosed by the reports of such cases, that if the relations existed between the parties as charged they should not, at some time during the period, have incautiously or recklessly betrayed the fact by some of the means above specified."[9] Where intimacy between the parties was shown, but of such a nature as, in their relative situations, might have been without criminality, the bill was dismissed.[10] General cohabitation—that is, in the sense of being together all or most of the time in the same household, not the living together ostensibly as husband and wife—apart from suspicious circumstances characterizing it, is not enough to warrant an inference of the fact of adultery.[11] In connection with the fact of general cohabitation must be considered the condition and rank in life of the parties, the habits and conduct of themselves and their equals in society, the domestic relations which each of them maintain with their own kin, the secluded, or open and avowed, place of cohabitation, the avocation of the parties and what demand it makes for constant or frequent intercourse, and all other things which go to show that the living or being together is or is not necessary, reasonable and compatible with innocence.[12] Adultery will be presumed from the fact that the man and woman occupy one bed;[13] and where the parties occupy the same room, in which is only one bed, for several months.[14] In one case the following circumstances, taken together, were considered as pointing to the conclusion of guilt: that the party with whom it was charged that the wife had committed the act, paid her frequent visits at a time when her husband was absent; that the parties were frequently seen together in secret and notorious localities, and at unusual hours without its being shown that they had occasion to meet for any honest or innocent purpose;[15] that she allowed him to take familiarities with her person; and that

[4] Dunham v. Dunham, 6 L. R. 141. And see, Blake v. Blake, 70 Ill. 618.
[5] Freeman v. Freeman, 31 Wis. 235.
[6] Larison v. Larison, 20 N. J. Eq. 100.
[7] Pollock v. Pollock, 71 N. Y. 137. See Bishop on Marriage, Divorce & Separation, § 1370.
[8] Berckmans v. Berckmans, 26 N. J. Eq. 122.
[9] See Pollock v. Pollock, *supra*.
[10] Mayer v. Mayer, 21 N. J. Eq. 246.
[11] Hart v. Hart, 2 Edw. Ch. 207.
[12] Pollock v. Pollock, *supra*.
[13] Clapp v. Clapp, 97 Mass. 531.
[14] Scroggins v. Scroggins, Wright (Ohio), 212.
[15] See State v. Marion, 35 N. H. 22.

the respondent furnished the wife with money to defend the suit.[16] On the other hand the court thought, that the fact that the persons were together in lonely places, or that they were frequently together at night at the house of the defendant when her husband was absent, would not of itself furnish evidence sufficient to justify the court in declaring that they had committed adultery.[17] The visit of a married man to a brothel is a strong circumstance of suspicion;[18] and his remaining alone in a room, at such a place, for some time, with a common prostitute, has been held sufficient proof of guilt.[19] But a visit of this sort, as has been pointed out by Mr. Bishop, might be one of philanthropy or of lawful business, and is therefore open to explanation.[20] The suspicion would perhaps be stronger against a woman who should visit such a place in company with a man. The mere fact that a married woman visited a man other than her husband at his lodgings, without other incriminating circumstances, has been held insufficient to convict her of adultery. In Williams v. Williams,[21] the husband had forbidden the alleged paramour, Thomas, tocome any more to his house. Thomas thereupon took lodgings where the wife visited him, staying a considerable time, and they passed there for husband and wife. Lord Stowell, distinguishing the case from another said: "It is not proved nor assumed that she took the name of Mrs. Thomas. He called her so and said that she was his wife, but it is not proved that she called him her husband, or that she knew that he called her his wife; he might speak of her in that name but that will not show her knowledge of the fact. The only circumstance of clandestinity which is proved is that Thomas attended her almost to her own house, and then left her; but that the court should infer that this happened from a clandestine intention, or that it might not be by accident, is, I think, not warranted by any rules of evidence on which this court can safely proceed. The question then comes to this: Does the visit of a married woman to a single man's lodging or house, in itself, prove the act of adultery? There is no authority mentioned for such an inference but the case of Eliot v. Eliot, which is open to the distinction, arising from the character of the house in that case, which is too obvious to be overlooked. It would be almost impossible that a woman could go to such a place but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact. In the late case of Ricketts v. Taylor in the King's Bench, the visit of the wife to a single man's house, combined with other circumstances, was held sufficient. In that case the windows were shut, and there were letters which could not be otherwise explained. That case, therefore, is no authority in this inquiry and, though the court might be induced to think that such visits were highly improper, it must recollect that more is necessary, and that the court must be convinced in its legal judgment that the woman has transgressed not only the bounds of delicacy but also of duty." In Hunt v. v. Hunt,[22] it is intimated that the fact that the wife was alone in the room with her alleged paramour was not, under the circumstances, sufficient proof of adultery. However, in that case, says Mr. Bishop, "the proofs against the wife seemed conclusive, and plainly the judgment that she was an adulteress would have been pronounced, and the grievous consequences would have fallen upon her but for her ability to prove at the trial, beyond the possibility of contradiction, that even then and after she had cohabited with her husband eight years, she was a virgin."[23]

But in a late case the proof of the wife's visits was accompanied by proof of other circstances strong enough in their incriminating tendency to sustain the charge. Her visits to her alleged paramour were clandestine, so far as her husband and family were concerned; she visited him when her absence from home was ostensibly for other purposes; and although he had been an acquaintance at her own house, she never mentioned the

[16] Patterson v. Patterson (N. J., July, 1890), 20 Atl. Rep. 347.

[17] Whitenack v. Whitenack, 36 N. J. Eq. 474.

[18] See Astley v. Astley, 1 Hagg. Ecc. R 720; Kenrick v. Kenrick, 4 *Id.* 114. There is an old English proverb to the effect that people do not visit such places to say their *paternoster*.

[19] Astley v. Astley, *supra*; Dailey v. Dailey, 64 Ill. 329.

[20] See 2 Bish. Mar. & Div. § 626; 2 Greenl. on Ev. (14 Ed.), § 44, and note *a*, p. 38; Latham v. Latham, 30 Gratt. (Va.) 307.

[21] 1 Hagg. Con. 299, 4 Eng. Ecc. R. 415.

[22] Deane & S. 121.

[23] See 2 Bish. Mar. & Div. § 1360.

fact of their renewed meetings to her husband. She passed at his boarding place as his wife. She visited him when he was presumably in bed; and she dressed and undressed in the room. "These facts," said the learned judge, "taken in connection with what has been pointed out as to her conduct with others, leave no room for doubt that desire and opportunity met on the occasions of these visits with the presumable result."[24] If by neglect of the husband the wife is obliged to seek other society or associations, or to forego all intercourse with other men, and she does nevertheless embrace the ordinary opportunities that are afforded all females for enjoying social intercourse with the other sex, and the husband brings suit for a divorce, in such a case the court would not adjudge the wife guilty if her innocence might fairly be inferred.[25] But it is not consistent with the innocence of one accused of adultery that after being found in a compromising position, she should continue for a week under the reproaches of her husband's family without setting up the explanation afterwards given, that she was resisting the attempts of respondent.[26]

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[24] See Graham v. Graham, (50 N. J. 701.

[25] See Patterson v. Patterson, 20 Atl. Rep. 347; Derby v. Derby, 21 N. J. Eq. 36.

[26] Flavell v. Flavell, 20 N. J. Eq. 211.

MUNICIPAL CORPORATION—CITY ORDINANCE —VALIDITY—ERECTION OF BUILDINGS—INSPECTOR'S ASSENT.

CITY OF SIOUX FALLS V. KIRBY.

Supreme Court of South Dakota, Oct. 4, 1894.

1. A municipal corporation possesses the following powers, and no others: First, those granted in express terms; second, those necessarily and fairly implied, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

2. The right of a party to exercise dominion over his own property, and to build upon and improve the same, in accordance with the general laws of the land and municipal ordinances applicable alike to all citizens of a city, is secured by the fundamental principles of the constitution; and he cannot be compelled by the municipal government under which he lives to hold that right subject to the power of granting or refusing a permit to build upon or otherwise improve his property, vested in a city building inspector, from whose decision there is no appeal. Kellam, J., dissenting.

3. An ordinance of the city of Sioux Falls which prescribed that before any person can erect any building, or any addition thereto, within the city limits, he must first apply to and obtain from the city building inspector a permit, and who may grant or refuse such permit, and from whose decision there is no appeal, and which subjects such party to a penalty in case he builds without such permit, violates the constitutional rights of the citizen, in that it makes the right of the owners of property to improve and use the same dependent upon the decision of the city building inspector, and is therefore void.

CORSON, P. J.: The respondent and defendant was arrested and tried upon a complaint charging him, in substance, with having willfully refused to take out a building permit and to pay the prescribed fee therefor after being requested so to do by the building inspector of the City of Sioux Falls, contrary to the ordinance of said city. The respondent was convicted in the city police court, but on appeal to the Circuit Court he was acquitted; that court holding that the provisions of the ordinance requiring a party to take out a permit, and pay a fee therefor, were void. The case was brought to this court from the Circuit Court by appeal.

The respondent moved in this court to dismiss the appeal upon the ground that the case should have been brought to this court by writ of error, and not by appeal. In a similar case (City of Huron v. Carter, 57 N. W. Rep. 947) this court held that the act charged, not being punishable by imprisonment, was properly brought to this court by appeal. Following the decision of that case, the motion to dismiss upon that ground is denied.

The respondent relied on his motion to dismiss the appeal upon the further ground that the notice of appeal was not properly served upon the clerk of the Circuit Court; but after a careful examination of the affidavits read on the hearing, and the original records in this court, we are inclined to the opinion that the notice of appeal was properly served, and so hold. The only question that we shall consider on this appeal is the one upon which the Circuit Court ruled, namely, that so much of the city ordinance as required the respondent to take out a permit, and pay the prescribed fee therefor, was void.

Section 100 of the ordinance reads as follows: "Building Permits. — Any person desiring to erect, alter or repair any building to be used exclusively not for business purposes, shall apply to said building inspector for a permit for such purpose and furnish him a written statement showing the location, dimensions and manner of construction of the proposed building, stating the material to be used, and manner of construction of chimneys and stove pipe connections, and exhibit to said inspector any plans or specifications of the same which he may have. If satisfied that such building, alteration or repair is in compliance with the provisions of this chapter, the building inspector shall give his permit for such proposed building or structure on paymen

of the fees prescribed in the next section." Section 101 of the ordinance prescribed the fee to be paid for such permit, being from $1 to $4 for buildings not exceeding in value $5,000 and 50 cents additional for each $1,000 above $5,000, with certain exceptions not necessary now to be noticed, and section 126 provides that a fine not less than $5 nor more than $100 may be imposed for a violation of the ordinance. The learned counsel for the respondent contends that the city council has no power under the act of 1890, providing for the incorporation of cities, to require the respondent to procure a building permit, and pay the prescribed fee therefor. He admits that, under the power conferred upon the city council by the statutes of this State, it has power to pass ordinances to prevent the construction of buildings having dangerous chimneys, etc., within the city limits, and to provide penalties for the violation of such ordinance; but he contends that in this case there is no charge that respondent has erected any defective chimney or other appliance in violation of any ordinance, and that, therefore, no offense is charged. We are inclined to agree with counsel in his contention.

By chapter 37, art. 5, Laws 1890, it is provided that: "The city council shall have the following powers, * * * (50) To prescribe the limits within which wooden buildings shall not be erected or placed or repaired without permission, and to direct that all and any buildings within said limits, (which shall be known as the fire limits) when the same shall have been damaged by fire, decay, or otherwise, to the extent of fifty per cent. of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage. (51) To prevent dangerous construction and condition of chimneys fire places, hearths, stoves, stove pipes, ovens, boilers, and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition where considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition."

Mr. Dillon, in his work on Municipal Corporations, defining the powers of such corporations, says: "It is a general and undisputed proposition of the law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily and fairly implied, or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." 1 Dill. Mun. Corp. (4th Ed.) § 89, and cases there cited. And this is substantially the rule as laid down in Treadway v. Schnauber, 1 Dak. 236, 46 N. W. Rep. 464, by the late territorial Supreme Court. It will be observed that no power is expressly granted to the city council to require of a party desiring to construct a building, or an addition to one existing, to procure a permit therefor, and that no express power is conferred upon the city council to require a fee to be paid for a pemit. The city council, by the ordinance in controversy, it will be noticed, has not only assumed to require a permit to be procured for the erection of any building or structure within the city limits, and to require a fee to be paid therefor, but has provided that this permit can only be obtained from the inspector when he is "satisfied that such building, alteration or repair is in compliance with the provisions" of that chapter. The ordinance is therefore much broader and more comprehensive in its scope than the power conferred by the statute referred to, and cannot be justified, it seems to us, as a reasonable exercise of the authority conferred by the statute. The right of a person to use and improve his property as he may deem proper, consistent with law, is a constitutional right, of which he cannot be deprived at the mere will and pleasure of a city council, or of any officer appointed by it. While the city council may pass any ordinance that may be proper and necessary as to the manner of constructing buildings, chimneys, and other fire apparatus so as to protect the residents of the city from the dangers of fire, and may prescribe such penalties for the violation of the same as are within the limits provided by statute, it cannot impose upon the citizen unnecessary burdens,and in effect permit him to improve her property, or refuse to permit him so to do as the building inspector may determine. Section 100 of the ordinance does not contain any regulations to guide the landowner in the construction or alteration of a building upon his land, but requires of such landowner, before any such building can be constructed or alteration made, that he must apply to the inspector for a permit, which he is required to give when he is satisfied that such building or alteration is in compliance with the ordinance. It does not merely forbid the erection of any building which is hazardous, or which exposes property or persons to danger from fire; but it requires of the landowner that he obtain a permit from the inspector, and pay the prescribed fee therefor, which may be granted or withheld by such inspector, as he may or may not be satisfied that the building complies with the requirements of the ordinance, which, as we have seen, makes no provisions as to what shall be deemed necessary to constitute a safe construction. It is clear that the ordinance in controversy, upon its face, attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own property depend upon the arbitrary will of the city inspector, and therefore makes the right of the citizen to use his property subject to the will of such inspector, from whose decision no appeal is given. Such

an ordinance cannot be sustained. Its provisions are not necessarily or fairly implied from, or incidental to, the power granted the city council. Yick Yo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; Newton v. Belger, 143 Mass. 598, 10 N. E. Rep. 464; State v. Tenant, 110 N. C. 609, 14 S. E. Rep. 387; State v. Webber, 207 N. C. 962, 12 S. E. Rep. 598; Bills v. City of Goshen, 117 Ind. 221, 20 N. E. Rep. 115; Anderson v. City of Wellington, 40 Kan. 173, 19 Pac. Rep. 719; May v. People, 27 Pac. Rep. 1010, 1 Colo. App. 157; Tugman v. Chicago, 78 Ill. 405. We cannot close the discussion of this section of the ordinance better than by quoting the vigorous language of Mr. Justice Matthews in the case first above cited. He says: "But the fundamental rights of life, liberty, and the pursuits of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilizalion under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwerlth 'may be a government of laws and not of men,' for, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Section 101 of the ordinance is equally objectionable. While it does not in terms impose a tax upon the landowner who desires to improve his property, it in effect does so. The office of building inspector is created, and he is clothed with certain powers, not alone for the benefit of those who are about to erect buildings, but for the benefit of the citizens of the municipality generally; and to require a person, before he can be permitted to improve his property, to pay for a permit which is not required of the other residents, imposes a burden upon him not imposed upon the citizens generally. Such a burden cannot be imposed except by express authority. We know of no reason why a landowner should be required to pay a fee for the privilege of improving his property that might not be applied to the removal of a person from one part of the city to another, or to the renting or any other use of property. We are of the opinion that no such fee can be legally required, in the absence of an express legislative power authorizing its collection.

Our conclusions are that the Circuit Court ruled correctly, and properly instructed the jury to find a verdict for the respondent. The judgment of the Circuit Court is affirmed.

NOTE.—Kellam, J., who dissents from the majority of the court in the principal case, thinks that though the law as laid down by them is correctly abstracted it is misapplied to this case. No one, he says, at this day, will question the power of the legislature to prohibit the erection of buildings constructed of wood, or other inflammable material within the limits of a city. It is a police regulation often demanded by considerations of public safety. In such cases the convenience of the individual citizen must give way to the safety of the public. Nor can it be doubted that such power can be delegated to municipalities. Among the powers so generally conferred is the right to protect property from destruction by fire by prohibiting the erection of combustible and dangerous buildings within the limits of such municipality or within more circumscribed limits to be designated by the governing body of such municipality. This is all plain enough, but the majority of the court is of the opinion that the particular ordinance in question is invalid because it subordinates the right of the individual landowner to improve his property by building thereon to the arbitrary will of a building inspector. in that it requires the landowner as a condition precedent to the erection of such building to make a statement to such inspector of the character and location of the building he proposes to erect, the material to be used, and how the chimneys are to be constructed, and then that such inspector may refuse a permit for such building and thus prevent its erection, unless he is satisfied that such building is to be constructed "in compliance with the provisions of this chapter." The dissenting judge thinks that the mistake of the opinion is in considering the power thus conferred upon the inspector an arbitrary one. The language of this section plainly implies that this particular provision is supplementary to other sections of the chapter which prescribed general regulations, etc. It cannot be contemplated that the decision of the inspector will be arbitrary or willful or capricious. It is to be the exercise of a *quasi*-judicial function by a sworn and bonded public officer. In this respect he is put on the same footing as many other ministerial or executive officers who are required to pass upon acts or instruments and govern their conduct accordingly. Statutes have often forbidden the doing of acts otherwise lawful, such as selling intoxicating liquors, except when certain preliminary conditions exist or have been complied with and have committed to local boards and officers the right and duty of granting or refusing permits or licenses therefor, according as they are or are not satisfied that such prescribed conditions exist or have been conformed to by the application. But such laws have not been held invalid because under them such board or officers might captiously refuse to be satisfied. In the case cited in the majority opinion it will be noted that the ordinances condemned contained no such element as appears in this. There was no general regulations applicable to all proposed builders, as to material or construction, to guide and control the inspector; but the power of determining whether or not a permit to build should be granted was left to the unqualified, unguided, and therefore arbitrary will of the council or inspector. In State v. Tenant, a North Carolina case, found in 14 S. E. Rep. 387, and cited in the opinion, the ordinance was this: "That no person, firm or corporation shall build or erect within the limits of the city, any house or building, of any kind or character, or otherwise add to, build upon or generally improve or change, any house or building, without having first applied to the alderman and obtained a permission for such purpose." The court, it seems to me, rightly held the ordinance void because "it prescribed no general rule for the exercise of discretion in granting permits," but allowed the granting of a permit to one, and the refusal

to another, under precisely the same conditions, with no reason therefor but the irresponsible and arbitrary will of a majority of the aldermen. In City of Newton v. Belger, 143 Mass. 598, 10 N. E. Rep. 464, the ordinance was as follows: "No person shall erect, alter or rebuild, or essentially change any building or any part thereof, for any purpose other than a dwelling house, without first obtaining in writing a permit from the board of aldermen. The application for such permit shall specify the location and size of the building, the material of which it is to be constructed and the use for which it is intended." This ordinance was held void on the same ground stated in the North Carolina case, the court remarking: "Under the ordinance they may refuse a permit because, in their opinion, it is desirable that certain parts of the city shall be used only for handsome dwelling houses." "These cases" says the dissenting judge, "are representative of their class, but I discover nothing in them that requires the condemnation of an ordinance that first prescribes general and uniform rules regulating the kind of buildings that may and may not be erected, and then merely intrusts to an officer qualified by an oath and bond the duty of issuing permits to all who satisfy him that their proposed buildings will comply with the prescribed conditions. To me the ordinance does not seem obnoxious to the objection urged against it."

JETSAM AND FLOTSAM.

DIVORCE MADE EASY.

We have been accustomed to look upon the United States as the home of divorce, and as an El Dorado where might be found a means of putting a final end to conjugal infelicities for very slight reasons, and, indeed, we have only to read a recent case from Omaha to realize what frivolous grounds for a separation have been urged. In this case the applicant complains that his spouse, who had previously rejoiced him with her dusky tresses, had taken the pernicious notion to bleach them, and by reason thereof it had become necessary that she should paint her face—presumably to harmonize—and that thereby she had acquired a "giddy, fast, and sporty appearance," which was foreign to his notions of decency.

Such being our ideas of divorce, as it obtains in the United States, we are naturally surprised on turning to the statistics of Japan to find that this sixteenth century nation with a nineteenth century government recognizes grounds of separation between husband and wife which would put even Omaha to the blush. In the number even of divorces Japan leads the van of the nations, for it is stated that in the year 1890, during which period there were 340,445 marriages, there were no less than 107,478 divorces. The grounds of divorce are (1) infidelity; (2) disobedience to either the husband or his parents; (3) kleptomania; (4) contagious or incurable disease; (5) sterility; (6) jealously; and (7) excessive talkativeness. The second ground would seem to be on a par with the alleged mother-in-law nuisance of the western nations. The sixth ground, although apparently trivial, has more importance than might be supposed; for while a Japanese may legally have but one wife, he may have two concubines, who are permitted to live in the same house as does his wife.

When a divorce, sought on the ground of "excessive talkativeness," is opposed by the wife, we imagine the fun would begin. Such opposition, however, is rare, as the women are as yet, for the most part, not sufficiently free from the control of their liege lord to attempt to thwart his wishes, and the recent law giving women the right to sue for divorce is as yet made but little use of. The right to the custody of the children remains in the husband, no matter whence the cause of divorce emanated.—*Canadian Law Journal.*

WOMEN AS JURORS.

Chief Justice Howe of Wyoming has written a letter in which, after deprecating the notoriety which he has received through the circumstance of being the first judge to open court with women as jurors, and after admitting his prejudices against the policy, paid a high compliment to the women jurors who served in his court. He said: "They were careful, painstaking, intelligent and conscientious. They were firm and resolute for the right as established by the law and the testimony. Their verdicts were right, and after three or four criminal trials, the lawyers engaged in defending persons accused of crime began to avail themselves of the right of peremptory challenge to get rid of the female jurors, who were too much in favor of enforcing the laws and punishing crime to suit the interests of their clients. After the grand jury had been in session two days, the dance house keepers, gamblers and demi-monde fled out of the city in dismay, to escape the indictment of women grand jurors. In fact, I have never in my twenty-five years of constant experience in the courts of the country seen more faithful, intelligent and resolutely honest grand and petit jurors than these."

BOOKS RECEIVED.

A Treatise on the Law of Evidence, With a Discussion of the Principles and Rules which Govern its Presentation, Reception and Exclusion, and the Examination of Witnesses in Court. By H. C. Underhill, LL. B. Chicago: T. H. Flood & Company, Law Book Publishers, 1894.

HUMORS OF THE LAW.

Many years ago the Supreme Court of New York adopted a rule that briefs (there called points) of lawyers, in appeal cases, should be printed on paper of a certain prescribed length and width, leaving on each page a blank margin of two inches. The more conservative of the older members of the bar were greatly opposed to this rule, and insisted that it caused a needless outlay of money for their clients, etc., etc. Among those so objecting was the late Judge Rosecrans, then at the bar of Saratoga County. It soon happened that the judge had a case on appeals to argue before the court at general term. Determined to disregard or evade the rule, he prepared his points very carefully and committed them to memory. The time came for argument of the cause. His opponent was the late Judge Hay, famed in his day for keen, incisive wit. When the case was called Rosecrans arose and began his argument. Presently the presiding judge stopped him and asked him where were his printed points. "They are here, if the court please," replied Rosecrans, tapping his magnificent forehead with the tip of his finger. "Yes," snapped out Judge Hay, "and a great deal more blank margin than the rule requires."

For once in his life, the laugh was decidedly on Judge Rosecrans.—*Green Bag.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION AGAINST SEVERAL DEFENDANTS.—Where several defendants are jointly sued under the code for attorney's fees, they may show under a general denial that the services rendered each of them were rendered under several contracts, so as not to warrant a joint judgment against them for the full amount of the services.—TRUMBULL v. JACKMAN, Wash., 37 Pac. Rep. 680.

2. ADMINISTRATOR'S SALE—Validity.—The fact that a sale of land was for cash, while the law provides that such sale be on credit, is a mere irregularity, and is not ground for a collateral attack on the sale.—CASSELS v. GIBSON, Tex., 27 S. W. Rep. 725.

3. APPEAL—Exceptions.—Under section 2302, Rev. St. 1889, providing that "no exception shall be taken in an appeal or writ of error to any proceeding in the Circuit Court, except such as shall have been expressly decided by such court," an omission to except to the denial of a new trial debars appellant from presenting for review any ruling at the trial.—DANFORTH v. LINDELL RY. CO., Mo., 27 S. W. Rep. 715.

4. CARRIERS—Goods Sent C. O. D.—Where diamonds in an unmarked package are delivered by a servant of the sender to an express company, with a note directing them to be sent "C. O. D. $86.75," and a receipt for a C. O. D. package is given to the servant, who fails to deliver it to the sender, the company is not liable for failure to collect on delivery, as the sender is charged with notice of the contents of the receipt.—SMITH v. SOUTHERN EXP. CO., Ala., 15 South. Rep. 62.

5. CHATTEL MORTGAGE.—Where a mortgagor and mortgagee have agreed to adjust, at the end of one year, accounts which are independent of the mortgage, and to apply on the mortgage debt any balance in favor of the mortgagor, and such accounting is not made, the mortgagor may, in a statutory action of detinue against him by the mortgagee, where the amount of the mortgage debt is in issue, have the court ascertain and so apply such balance.—FOSTER v. SMITH, Ala., 16 South. Rep. 61.

6. CHATTEL MORTGAGES—Validity—Mortgagor's Exemptions.—By the law of Michigan, a mortgage of a stock of goods, subject to all exemptions from execution to which the mortgagor is entitled under the laws of the State, is not invalid, even as to a creditor garnishing the mortgagee before a separation of the exempt portion, as the exemption law furnishes the means of separation and identification, and the mortgagee takes a defeasible title to the entire stock, subject to be defeated by a selection of the exempt goods when made by the mortgagor.—WILSON v. PERRIN, U. S. C. C. of App., 62 Fed. Rep. 629.

7. CONTRACT—Conditional Sales—Construction.—The title of a vendee is not affected by an agreement in the contract that the oxen should stand good for themselves until paid for, since such agreement is void under Code, § 1731, as an attempt to create a verbal mortgage to secure a debt on personalty.—BARNHILL v. HOWARD, Ala., 16 South. Rep. 1.

8. CONTRACT — Construction — Trespass.—An agreement to deliver at a certain place a quantity of water, "through and from a pipe, flume, or conduit," does not authorize the person to whom the delivery is to be made to cut at such place a hole in the pipe through which the water flows, and permanently attach thereto a pipe leading to his own premises.—SEFTON v. PRENTICE, Cal., 37 Pac. Rep. 641.

9. CONTRACTS—Performance—Decision of Inspector.—A contract with a county by plaintiff, a non resident corporation, to build a jail, provided that the county should appoint a commissioner qualified to judge of the work, whose duty it should be to inspect and report upon the work, and to notify plaintiff of any work or materials not in accordance with plans and specifications; his allowing the work to be completed without notice to be considered as an acceptance of it by the county: Held, that it was no defense to an action for the contract price that the commissioner appointed was not qualified for the duty, and that nothing but positive proof of *mala fides* on plaintiff's part could overcome the finality of the commissioner's action.—PAULY JAIL BLDG. & MFG. CO. v. HEMPHILL COUNTY, U. S. C. C. of App., 62 Fed. Rep. 698.

10. CONTRACTS—Public Policy — Combinations.—A contract by a brewing association with dealers in a city to furnish them beer in bulk, and not to furnish it in bulk "to any other party" in such city, for one year, is not void as against public policy and in restraint of trade, so as to prevent a recovery for beer sold thereunder.—ANHEUSER-BUSCH BREWING ASS'N v. HOUCK, Tex., 27 S. W. Rep. 692.

11. CONTRACT—Rescission—Quantum Meruit.—Where one who has contracted with another to build a house wrongfully ousts the contractor, and prevents him from completing the work, the latter may treat the contract as rescinded, and can recover on *quantum meruit*.—ADAMS v. BURBANK, Cal., 37 Pac. Rep. 640.

12. CORPORATIONS — Fictitious Indebtedness. — The owners of suburban property incorporated a land company for purposes of development. They also incorporated a street railway company to render the property accessible. The companies executed a joint mortgage to secure joint and several bonds for $150,000 an amount which either had a right to borrow alone. The railway company received $50,000 of this sum, and the land company the balance: Held, in an action to foreclose the mortgage, that the bonds were not fictitious indebtedness, prohibited by Const. art. 12, § 6, though neither company had received the amount for which it was liable.—NORTH SIDE RY. CO. v. WORTHINGTON, Tex., 27 S. W. Rep. 746.

13. CORPORATION—Insolvent Corporation—Creditors—Unpaid Stock Subscriptions.—While unpaid stock subscriptions are assets of an insolvent corporation for the benefit of its creditors, of which a court of equity will, by proper proceeding *in personam*, compel

payment when the corporation fails or refuses to call for or collect the same, the corporation itself is a necessary party to such a proceeding, and jurisdiction for this purpose over a foreign corporation which has no office, officer, agent, or place of business in this State cannot be obtained by merely serving the corporation by publication.—KING v. SULLIVAN, Ga., 20 S. E. Rep. 76.

14. CORPORATION—Insolvent Corporation—Receiver's Certificates.—A court of another State having no jurisdiction to appoint a receiver for property situated in Texas, it cannot authorize a receiver to issue certifi cates which shall be a lien on such property.—POOL v. FARMERS' LOAN AND TRUST CO., Tex., 27 S. W. Rep. 744.

15. COUNTIES—Judgment on Bonds.—Where the stat ute authorizing the issuance of bonds provides for their payment by levying a special tax and creating a special fund, the allowance by the county board and audit of a claim on a judgment on such bonds, as payable out of the general fund, is not an allowance in the manner and to the extent to which the holder is entitled, and he is not precluded from maintaining an action on the judgment because another remedy is prescribed by statute to enforce payment of claims allowed and audited.—VINCENT v. LINCOLN COUNTY, U. S. C. C. (Nev.), 62 Fed. Rep. 705.

16. COURTS—Disqualification of Judge.—A judge is not disqualified from hearing a case because his brother, who is attorney for one of the parties, has a contingent interest in the result.—WINSTON v. MASTERSON, Tex., 27 S. W. Rep. 691,

17. CRIMINAL EVIDENCE—Larceny.—It is irrelevant that the woman with whom the owner of the stolen property boarded kept a bawdyhouse. — SMITH v. STATE, Ala., 16 South. Rep. 12.

18. CRIMINAL LAW—Adultery.—Where, in a prosecution for "living in a state of adultery or fornication," the evidence showed that the woman was unmarried, and that the man was married, an instruction that if there was an agreement to have sexual intercourse, and that in pursuance thereof they did have intercourse, at their mutual convenience, then it was adultery, is not erroneous.—WALKER v. STATE, Ala., 16 South. Rep. 7.

19. CRIMINAL LAW—Bribery of Juror—Drunkenness.—On indictment for offer to bribe, where the defense is intoxication, the person to whom the offer is alleged to have been made, having known defendant many years, may testify that he thinks that defendant was talking with his usual intelligence; that that is his recollection.—WHITE v. STATE, Ala., 16 South. Rep. 63.

20. CRIMINAL LAW — Homicide.—An indictment for murder charges every grade of unlawful homicide, and a plea of not guilty puts in issue the guilt of the defendant as to every grade and degree of homicide prohibited by law.—REYNOLDS v. STATE, Fla., 16 South. Rep. 78.

21. CRIMINAL LAW — Perjury.—Where summons and complaint are served on defendant after the return day of the writ, such service is void, and he is not guilty of perjury in swearing that no writ was served on him on that day, however corrupt the intention, and however false defendant may have believed his statement to be.—URQUHART v. STATE, Ala., 16 South. Rep. 17.

22. CRIMINAL PRACTICE — Homicide.—An indictment for murder, which alleges the mortal wound to have been given with a knife, and to have been inflicted "in and upon the body" of the deceased, is in that respect sufficient. It is not necessary to state upon what particular part of the body the wound was inflicted.—WALKER v. STATE, Fla., 16 South. Rep. 80.

23. CRIMINAL PRACTICE — Indictment for Larceny.—An indictment for larceny, which alleges that defendant, at a certain time, was the assignee of certain persons, and intrusted by them with the care and safekeeping of certain moneys, to an amount named, and did then and there, unlawfully, fraudulently, and feloniously, convert the said moneys to his own use, is sufficient.—STATE v. WHITEMAN, Wash., 37 Pac. Rep. 659.

24. CRIMINAL PRACTICE—Setting Aside Indictment—Grand Juror.—Under Pen. Code Cal. § 897, providing for the setting aside of an indictment on a ground which would have been good for challenge to a grand juror, and section 896, declaring as ground for challenge to a grand juror a state of mind which will prevent him from acting impartially and without prejudice, a grand juror who joined in an indictment of strikers for obstruction of mail and commerce, though he indicated sympathy with them, will not be held to have been prejudiced, because thereafter, on the occasion of strikers destroying private property, he said they ought to be shot.—UNITED STATES v. CLUNE, U. S. D. C. (Cal.), 62 Fed. Rep. 798.

25. DECEIT—Parol Evidence.—In an action for deceit in the sale of land, oral evidence of what occurred before and when the deed was signed is admissible to show the situation and intention of the parties, in order to explain an ambiguity in the deed.—WILSON v. HIGBEE, U. S. C. C. (Nev.), 62 Fed. Rep. 723.

26. DEED—Boundaries.—Where a tract is described in partition by course and distance, "and to include the whole pond, with the dam," and the effect of including these would be to carry part of the southern boundary a few rods south of the line connecting two monuments, and the rest of the boundary could be maintained, not in the exact course described, but in a straight line with the monuments, and the northern boundary of the tract to the south is inconsistent with said southern boundary, as described, in both course and distance, the pond and dam are the controlling monuments, and the dividing line must be south thereof.—RATHBURN v. GEER, Conn., 30 Atl. Rep. 60.

27. DESCENT AND DISTRIBUTION — Advancements.—Testator provided that: "I do further will that what money I have advanced from time to time to either of my children shall be deducted from their share of the estate, that all may share equal:" Held, that money loaned by testator to a son, secured by a mortgage from the son's wife, which mortgage testator held till it was barred by limitation, and then satisfied without consideration, was not an advancement.—EX PARTE MIDDLETON, S. Car., 20 S. E. Rep. 34.

28. EJECTMENT—Evidence—Color of Title.—In ejectment, where there is evidence of possession by plaintiff before that of defendant, an instrument purporting to be a conveyance of the land in suit to plaintiff, and to be signed and duly attested, is admissible, where offered merely as color of title, though it is not acknowledged or executed.—GIST v. BEAUMONT, Ala., 16 South. Rep. 20.

29. EJECTMENT — Plaintiff's Title — Pleading.—Under Code Proc. § 532, providing that defendant in ejectment cannot show any estate in himself or another without specially pleading it, a general denial admits that he is a trespasser without title, and plaintiff, upon proof that the premises had been allotted him in partition, is entitled to recover, though defendant was not a party to the partition.—ALLEN v. HIGGINS, Wash., 37 Pac. Rep. 671.

30. EQUITY — Building Contract.—A contractor, to whom payment was to be made only upon approval of the work by the architect, gave complainants an order payable out of the amount to become due, which the owner accepted on condition that the architect approve the work. The contractor abandoned the work before completion: Held, that a bill in equity to enforce payment of such order, and for an accounting of the amount due the contractor, was demurrable, as complainants had an adequate remedy at law.—BERNZ v. MARCUS SAYRE CO., N. J., 30 Atl. Rep. 21.

31. EQUITY — Pleading—Multifariousness.—A creditors' bill to set aside as fraudulent several sales of goods to different persons at different times, there be-

ing no connection between the sales, is not multifarious.—HILL v. MOONE, Ala., 16 South. Rep. 67.

32. ESTOPPEL IN PAIS. — Where one by his words or conduct willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, or to alter his previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time.—CAIN v. BOLLER, Neb., 60 N. W. Rep. 7.

33. EVIDENCE — Opinion of Medical Expert.—It was competent for a medical expert to testify that, in his opinion, a given disease "may be cured by a surgical operation, but it is very rarely the case that this can be done," though the witness further testified he had no experience in treating that disease, but derived all his knowledge on the subject from reading medical authorities.—MAYOR, ETC., OF JACKSON v. BOONE, Ga., 20 S. E. Rep. 46.

34. EVIDENCE—Parol Evidence—Contract.—In an action for rent of an organ delivered to defendant under a written agreement providing that it was leased for 11 months for $10 per month, parol evidence that, before the execution of such agreement, plaintiff promised to send a music teacher to instruct defendant's child, and to take back the organ and repay the $10 already paid if the child was not old enough to operate the instrument, and that plaintiff did send a teacher, who decided that the child was too young to operate the instrument, but that defendant refused to take it away or repay the $10, is inadmissible.—CAULFIELD v. HERMANN, Conn., 30 Atl. Rep. 52.

35. EXECUTORS AND ADMINISTRATORS — Sale of Land to Pay Debts.—A sale of lands by the Probate Court to pay debts of a decedent will be enjoined, on application by a purchaser from the heirs, where sufficient personalty to pay all debts came to the hands of the administrator, but was wasted and misapplied.—BANKS v. SPEERS, Ala., 16 South. Rep. 25.

36. FEDERAL COURT — Jurisdiction — Claim and Delivery.—Property in possession of a sheriff under process issued by a State court cannot be taken out of his possession in an action of claim and delivery in the Federal Court.—PORTER v. DAVIDSON, U. S. C. C. (N. Car.), 62 Fed. Rep. 626.

37. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—A promise by a creditor to whom a debtor has transferred all his property, to another creditor, to pay him the debt due him from the common debtor, in consideration of his forbearing to enforce his debt, is within the statute of frauds, though incidentally benefits result to the promisor thereby.—MCKENZIE v. PUGET SOUND NAT. BANK OF SEATTLE, Wash., 37 Pac. Rep. 668.

38. GARNISHMENT — Assignment of Debt.—Where creditors assign the debt as collateral security before their debtor is garnished, the assignee's claim is superior to the garnishor's though the garnishee has no notice of the assignment until after he is garnished.—JONES v. LOWERY BANKING CO., Ala., 16 South. Rep. 11.

39. GARNISHMENT — City Funds in Hands of Officer.—City funds deposited in a bank by the city marshal to the credit of the city are not subject to garnishment on a personal judgment against such marshal.—MARX v. PARKER, Wash., 37 Pac. Rep. 675.

40. HABEAS CORPUS—Who may Issue Writ.—A writ of *habeas corpus* may be issued by a judge of the District Court, or by any judge of the Supreme Court, or by order of any judge of the Supreme Court, by the clerk thereof; or it may be issued by order of the District Court or the Supreme Court, by the clerk thereof.—IN RE MCMASTER, Okla., 37 Pac. Rep 598.

41. HUSBAND AND WIFE — Community Property.—A husband, in the absence of fraud, may assign all the community property for the benefit of community creditors without the wife joining in the deed, though a statute provides that no conveyance or incumbrance of the community real estate shall be valid unless the husband and wife join in the making thereof, as such assignment is only a surrender of the property into the custody of the court, to be applied as the law requires.—THYGESEN v. NEUFELDER, Wash., 37 Pac. Rep. 672.

42. HUSBAND AND WIFE—Community Property.—The levy of an execution on lands standing in the name of the wife, under a judgment against the husband for a community debt, will not be enjoined, though a small part of the purchase price has been paid with the wife's money, where the land was contracted for by the husband, and the contract assigned to the wife shortly before a deed was procured, when defendant was pressing for payment of his debt, and there was no understanding that the land should be the wife's until after such part payment was made.—CURRY v. CATLIN, Wash., 37 Pac. Rep. 678.

43. HUSBAND AND WIFE—Expenditure by Husbaad on Wife's Land.—In an action by creditors of an insolvent to subject a building erected by him on his wife's land to payment of their claims, the presumption being that the settlement was voluntary, the burden of proving that the building was to be credited on a debt due the wife from the husband is on the wife.—SEASONGOOD v. WARE, Ala., 16 South. Rep. 51.

44. INFANCY — Contract for Necessaries.—Where a minor contracts for the lease of a room, and leaves after occupying it for part of the period covered by the lease, he cannot be compelled to pay for the remaining time.—GREGORY v. LEE, Conn., 30 Atl. Rep. 53.

45. INJUNCTION — Interstate Commission.—A preliminary injunction to compel a carrier to obey an order of the interstate commerce commission in reference to freight rates on merchandise and manufactures should be denied where the answer denies that the rates defendant charges and which were passed on by the commission were unreasonable or unjust.—SHINKLE, WILSON & KRIES CO. v. LOUISVILLE & N. R. CO., U. S. C. C. (Ohio), 62 Fed. Rep. 690.

46. INJUNCTION—Performance of Duty by Employees.—Where employees of a railroad company, though remaining in its employment, refuse to perform their duties of operating its trains so long as Pullman cars are hauled, though the company is bound by contract to carry them, thus interrupting interstate commerce and the transmission of mails, and subjecting the company to suits and great and irreparable damage, injunction will issue requiring them to perform their duties during their continuance in the company's employment.—SOUTHERN CALIFORNIA RY. CO. v. RUTHERFORD, U. S. C. C. (Cal.), 62 Fed. Rep. 796.

47. INSURANCE — Agent — Estoppel.—Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing.—PHENIX INS. CO. OF BROOKLYN v. COVEY, Neb., 60 N. W. Rep. 12.

48. INSURANCE — Authority of Agent.—Where an insured requested the agent of a company, who was authorized to issue policies, fix rates, and countersign policies, to indorse on the policy permission for additional insurance, which he failed to do after promising to do so, the company is estopped to set up a provision against additional insurance, though the provision required such permission to be indorsed on the policy, and contained a clause restricting the agent's power to waive any of the provisions of the policy.—WEST v. NORWICH UNION FIRE INS. SOC., Utah, 37 Pac. Rep. 685.

49. INSURANCE—Loss.—Where the subject-matter of fire insurance, and the nature of the loss, are within Rev. St. 1879, § 6009, providing that where any policy shall be written on real property and the property shall be wholly destroyed, the amount of the insurance shall be taken, conclusively, to be the value of the property when insured, and the amount of loss and

measure of damages when destroyed, the stipulations of the policy must yield to the statute.—HAVENS v. GERMANIA FIRE INS. CO., Mo., 27 S. W. Rep. 718.

50. INSURANCE — Offer to Return Policy.—One who orders a policy of insurance, of a particular class, and gives his note for the amount of the premium, which the agent of the company had advanced, has a reasonable time within which to discover that a policy sent to him by mail is not of the class ordered, and to object to and return the same. If his offer to return, made in due time, be rejected, his retention of the policy thereafter, without appropriating it or making any use of it, will not subject him to pay the note.—JONES v. GILBERT, Ga., 19 S. E. Rep. 48.

51. INSURANCE — Waiver of Proofs of Loss.—A waiver of proofs of loss by an agent of a foreign fire insurance company, who has authority to solicit policies, being supplied with blank forms having the lithograph signatures of the officers of the company thereon, and collect premiums, will bind the company, though he may not have had actual power to do so.—SYNDICATE INS. CO. v. CATCHINGS, Ala., 16 South. Rep. 46.

52. JUDGMENT FOR DEFENDANT — Relief against Co-defendant.—Under Code, § 296, providing that judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants, and that the court may grant defendant affirmative relief, the court may give judgment for one of the defendants as as against another, if it can be done without injury to plaintiff.—BEATTIE v. LATIMER, S. Car., 20 S. E. Rep. 53.

53. JUDGMENT—Vacation.—To justify a court in setting aside a judgment on the ground of mistake, inadvertence, or excusable neglect, under section 4989, Comp. Laws, two things must appear, to wit, the mistake, inadvertence, or excusable neglect, and a probable meritorious defense on the part of the defendant asking such relief.—PETTIGREW v. CITY OF SOUIX FALLS, S. Dak., 60 N. W. Rep. 27.

54 JUDICIAL SALE—Agreement for Joint Purchase.—At a sheriff's sale of real property, five holders of liens against such property, none of whom were financially able to bid individually at such sale, entered into an agreement whereby one of their number, by attorney, bid in the property, which was struck off to him as trustee for himself and the other four lienholders: Held, that this was not such a combination as would of necessity discourage or prevent competition in bidding, and was therefore insufficient to vitiate the sale.—GULICK v. WEBB, Neb., 60 N. W. Rep. 13.

55. LANDLORD AND TENANT—Title.—In an action of unlawful detainer by a landlord against a tenant holding over the term of his lease, the tenant cannot set up a superior legal title.—ANDERSON v. ANDERSON, Ala., 16 South. Rep 14.

56. LIBEL—Blacklisting Alleged Debtor.—To "blacklist" a person in writing, and thus publish of and concerning him that he is a delinquent debtor, when in fact he owes nothing, tends to injure his reputation, render him odious, and expose him to public contempt.—WHITE v. PARKS, Ga., 20 S. E. Rep. 78.

57. LIEN — Logger's Liens.—An action for damages, under Gen. St. § 1694, for the destruction of logs on which plaintiff claims a lien, may be maintained without a prior determination in equity of the validity of such lien.—PETERSON v. SAYWARD, Wash., 37 Pac. Rep. 657.

58. LIEN—Thresher's Lien — Assignment.—Where a lien has been acquired under St. 1885, p. 109, by person performing work in or about a threshing machine while engaged in threshing, the same passes by the assignment of the debt under which it was acquired.—DUNCAN v. HAWN, Cal., 37 Pac. Rep. 628.

59. LIMITATION OF ACTIONS. — Where plaintiff's evidence shows that his action is barred by limitations, which defendant has pleaded, a nonsuit on motion of defendant is properly granted.—BOROUGH OF WALLINGFORD v. HALL, Conn., 30 Atl. Rep. 47.

60. LIMITATIONS — Substitution of Parties.—Where a receiver for a railroad situated wholly within the State of Texas is appointed by a Federal District Court of another State, through the conclusion of the railroad company, the receiver will be treated as the agent of the company, and, on the discovery of the fraud, the company may be substituted as defendant in an action for the death of plaintiff's husband, originally brought against the receiver, so as to avoid the bar of the statute of limitations.—TEXAS & P. RY. CO. v. GAY, Tex., 27 S. W. Rep. 742.

61. MANDAMUS TO COUNTY TREASURER—Payment of Warrant.—Under Sayles' Civ. St. art. 998, which provides that the county treasurer, if he has any doubt of the legality of a warrant presented to him for payment, shall make report thereof to the commissioners' court for direction, *mandamus* will not lie to compel the treasurer to pay a warrant the legality of which he doubts, and which he has been ordered not to pay by the commissioners' court.—WALKER v. GEO. D. BARNARD & CO., Tex., 27 S. W. Rep. 726.

62. MASTER AND SERVANT—Contributory Negligence.—Plaintiff was employed in defendant's mill to remove lumber to the runway of a saw. In connection with the runway there was a cog wheel, which crushed plaintiff's finger on the third day of his employment. The wheel was unprotected, and the view of it was somewhat obstructed from where plaintiff usually worked, but, if he had looked, he could have seen it at any time when the mill was clear of lumber: Held, that plaintiff could not recover.—OLSON v. MCMURRAY CEDAR LUMBER CO., Wash., 37 Pac. Rep. 679.

63. MASTER AND SERVANT — Negligence.—To maintain an action against his employer for personal injuries, the servant must establish some neglect of duty on the part of the master arising out of the relation between them, which was the direct cause of the injury, and which the master was bound to guard against.—ELWELL v. HACKER, Me., 30 Atl. Rep. 64.

64. MASTER AND SERVANT—Negligence.—In an action against a railroad company for the death of plaintiff's intestate, evidence that deceased could have been seen in time to avoid running over him, and that the engineer was probably asleep, is sufficient to sustain a verdict of negligence.—CRAFT v. NORTHERN PAC. R. CO., U. S. C. C. (Oreg.), 62 Fed. Rep. 785.

65. MASTER AND SERVANT — Wanton and Malicious Acts of Servant.—The wanton and malicious use of the steam whistle of a locomotive, by servants of a railroad company who are in charge of the locomotive, while it is in motion on a regular or authorized run, is an act within the scope of their employment, so far as to charge the company with liability for injuries caused thereby.—TEXAS & P. RY. CO. v. SCOVILLE, U. S. C. C. of App., 62 Fed. Rep. 780.

66. MECHANIC'S LIEN—Enforcement of Decree.—Sale under a judgment foreclosing a mechanic's lien against community property, will not be enjoined on the ground that the wife was not a party to the suit.—TURNER v. BELLINGHAM BAY LUMBER & MANUF'G CO., Wash., 37 Pac. Rep. 674.

67. MECHANICS' LIENS—Notice.—A notice of mechanic's lien which states that the claimant agreed with the owner "to furnish the lumber material to be used in the construction, erection, and completion of" a certain hotel is too uncertain as to the amount of such material, when it appears that, when the contract was made, the hotel was partly constructed, and the contract was to furnish lumber to complete it.—UNITED STATES SAV. LOAN & BLDG. CO. v. JONES, Wash., 37 Pac. Rep. 666.

68. MECHANIC'S LIEN—Priorities—Mortgage.—Under Comp. St. ch. 82, § 1376, providing that liens for labor or materials shall attach to the buildings or improvements for which the materials were furnished or work done, in preference to any prior lien or incumbrance, and that any person enforcing such lien may have such building or improvement sold under execution,

and the purchaser may remove the same within a reasonable time thereafter, a purchaser on foreclosure of such a lien may, as against the holder of a prior mortgage on the land, remain in possession of the land till the mortgage is foreclosed, and does not by so doing lose his right to remove the building or improvement from the land.—GRAND OPERA HOUSE CO. v. MCGUIRE, Mont , 37 Pac. Rep. 607.

69. MORTGAGE—Assignment.—Where a mortgagee assigns a mortgage and note, the assignment being recorded, and fraudulently procures a reassignment to himself, which he does not record, and later fraudulently obtains the mortgage and note, and assigns them to a third person, ignorant of the previous assignment and reassignment, the title to the note and mortgage, as between the two assignees, is in the former; the latter being deemed to have constructive notice of the the title, as it appears of record.—MURPHY v. BARNARD, Mass., 38 N. E. Rep. 29.

70. MORTGAGE BY MARRIED WOMAN—Estoppel.—Where a married woman executes to her son a mortgage, which expressly states that the debt it secures is her debt, and that it is given for the benefit of her separate property, she is estopped, as against an innocent purchaser of the mortgage, to allege that it was executed to secure a debt due by her son, and hence was invalid, under 20 St. 1121, which provides that a married woman shall not be "liable on any promise to pay the debt or answer for the default or liability of any other person."—BAILEY v. SEYMOUR, S. Car., 20 S. E. Rep. 62.

71. MORTGAGES — Collateral Security. — Code Civ. Proc. § 726, providing that there can be but one action for the recovery of a debt secured by mortgage on real estate, does not prevent separate actions on mortgages given as collateral security only of a debt, or of an action on a mortgage given as security for a debt after action on one given as collateral security.—MERCED SECURITY SAV. BANK v. CASACCIA, Cal., 37 Pac. Rep. 648.

72. MORTGAGE — Foreclosure—Sale—Confirmation. — The practice of courts of equity, requiring confirmation of judicial sales, may properly be followed in sales on foreclosure of mortgages by action under the statutes of this State; and a report of the sale to, and its confirmation by, the court is proper, whether indispensable or not under our system of foreclosure by action.—STATE v. CAMPBELL, S. Dak., 60 N. W. Rep. 32.

73. MORTGAGE — Fraudulent Record of Release.—Where a mortgagee executes a release of a mortgage, and places the same in the hands of a third party, to be delivered to the mortgagor upon his paying the mortgage debt, which condition the mortgagor never performed, and the release is placed upon record without the knowledge or consent of the mortgagee, neither the mortgagor, nor one who is not a *bona fide* purchaser without notice, will acquire any rights or advantage by the recording of such release.—WHIPPLE v. FOWLER, Neb., 60 N. W. Rep. 15.

74. MORTGAGE BY MARRIED WOMAN—Separate Estate.—Act 1887 provides that any mortgage, etc., executed by a married woman, affecting her separate estate, shall be a charge thereon, whenever the intention to do so is declared in the instrument: Held, that her note and mortgage, in which it is stated that it is her express intention to charge her separate estate, is binding thereon, though the debt secured was the debt of her husband.—HESTER v. BARKER, S. Car., 20 S. E. Rep. 52.

75. MORTGAGE ON LANDS OF COTENANT. — Where a mortgage exists on common property to secure the debt of one tenant, the equity of his cotenants to have his share sold first, in exoneration of theirs, is not lost by a partition between them in the Probate Court.—AUSTIN v. BEAN, Ala., 16 South. Rep. 41.

76. MUNICIPAL BONDS—Investment of Sinking Fund.—A city may bring *mandamus* to compel its treasurer to pay warrants issued to purchase bonds which are not to be delivered until the money is paid upon the warrants.—ELSER v. CITY OF FT. WORTH, Tex., 27 S. W. Rep. 739.

77. MUNICIPAL CORPORATIONS — Contract for Water Supply.—A contract which in terms binds a city to pay a certain sum yearly, for 15 years, for water, and fixes a price for additional hydrants, but does not compel the city to rent any additional hydrants, or prohibit a contract with any other company for additional supply or affect the right of other persons or corporations to supply water to the inhabitants, is not invalid as creating a monopoly.—WACO WATER & LIGHT CO. v. CITY OF WACO, Tex., 27 S. W. Rep. 675.

78. MUNICIPAL CORPORATION — Recitals—Estoppel.—Where a municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of the issuing of bonds, such a certificate will estop the municipality as against a *bona fide* purchaser of the bonds, from proving its falsity in order to defeat them.—NATIONAL LIFE INS. CO. OF MONTPELIER v. BOARD OF EDUCATION OF CITY OF HURON, U. S. C. C. of App., 62 Fed. Rep. 778.

79. MUNICIPAL CORPORATION—Street Improvements—Invalid Ordinance.—After a street has been paved under a void ordinance, which assessed the expense against the property benefited, the legislature may authorize the city to levy special assessments against such property, to the extent to which it was specially benefited.—MAYOR, ETC., OF BALTIMORE v. ULMAN, Md., 30 Atl. Rep. 43.

80. MUNICIPAL IMPROVEMENTS—Constitutional Law—Special Legislation.—The Missouri act of March 14, 1893, by the use of terms requiring the whole cost of improvement of streets, etc., to be charged against adjoining property, and said cost to be "levied, collected and paid in the manner and at the time now provided by law or charter of said cities," etc., indicates plainly the intent that said act shall apply only to charters now existing; and hence it is in conflict with the constitutional command against special legislation.—MURNANE v. CITY OF ST. LOUIS, Mo., 27 S. W. Rep. 711.

81. MUNICIPAL OFFICES — Abolishment.—Right of an officer to salary is not affected by diminution or cessation of the duties of the office, the office itself remaining.—MARQUIN v. CITY OF SANTA ANA, Cal., 37 Pac. Rep. 650.

82. NEGLIGENCE—Dangerous Leased Premises.—The tenant, who has full possession and occupancy, and not the landlord, is bound, as between himself and the public, to keep buildings and other structures abutting upon highways and streets in repair, so that they may be safe for the use of travelers passing along the same.—LEE v. MCLAUGHLIN, Me., 30 Atl. Rep. 65.

83. NEGLIGENCE—Intoxication.—One voluntarily intoxicated is chargeable with the same degree of care to avoid injury as a sober person of ordinary prudence under like circumstances.—JOHNSON v. LOUISVILLE & N. R. CO., Ala., 16 South. Rep. 75.

84. NEGOTIABLE INSTRUMENT—Indorsement of Note—Waiver of Demand.—A promise by an indorser to pay a note after maturity, with knowledge that no demand was made and no notice given, waives such demand and notice.—FIRST NAT. BANK OF HASTINGS v. BONNER, Tex., 27 S. W. Rep. 698.

85. NEGOTIABLE INSTRUMENT — Note—Consideration.—Where an agent, without authority, loans his principal's money for the purchase of lands in his principal's name, and later, without authority, but representing himself authorized, executes a deed of such lands to the borrower, and takes in return a purchase-money note, the deed so given conveys no title, and the note given therefor was without consideration.—EARNEST v. MOLINE PLOW CO., Tex., 26 S. W. Rep. 34.

86. NEGOTIABLE INSTRUMENT—Note—Consideration—Void Issue of Stock.—The secretary of a corporation is acting as its agent where he solicits a stock subscription, turns over to the company a note given therefor, whereupon the president delivers the stock certificate to the purchaser, and such actions are thereafter ratified by the board.—JEFFERSON V. HEWITT, Cal., 37 Pac. Rep. 638.

87. NEGLIGENCE — Sufficiency of Complaint.—In an action for personal injuries, allegations that defendant's car on which the injured party rode had a defective brake, and that, when it approached the curve where it was derailed, defendant's servant negligently applied the full power to it, whereby it was derailed, and plaintiff was thrown through the window and injured, sufficiently specify the negligence complained of.—SAN ANTONIO ST. RY. CO. V. MUTH, Tex., 27 S. W. Rep. 752.

88. PARENT AND CHILD—Custody of Child.—One who has no legal right to the custody of a child cannot question the competency of the parents to care for it. —LOVELL V. HOUSE OF THE GOOD SHEPHERD, Wash., 37 Pac. Rep. 660.

89. PARTITION—Parties.—The holder of several bonds for titles from various persons binding them to convey to him certain undivided interests in land, with parts of the purchase money paid, is not entitled to institute proceedings for a partition of the premises by sale; not does he, after instituting such proceedings, obtain a right to such partition by obtaining from one only of his vendors a deed conveying to him an undivided interest in the land, none of his other vendors being parties to the proceedings.—JONES V. NAPIER, Ga., 20 S. E. Rep. 41.

90. PARTNERSHIP.—An agreement whereby one is to furnish lumber, and market the same when sawed, and the other is to saw it on halves, makes a partnership.—LEE V. RYAN, Ala., 16 South. Rep. 2.

91. PARTNERSHIP — Judgment against Partners.—Where persons are sued as individuals composing a firm, and as joint debtors, and are called by their individual names in the pleadings and papers and in the caption of the judgment entry, the entry itself, "that the plaintiff herein recover of the defendants [name of firm] the sum," etc., shows a judgment against each individual member of the firm.—OLSON V. VEAZIE, Wash., 37 Pac. Rep. 677.

92. PARTNERSHIP — Powers of Partner.—Where one member of a mercantile partnership, in due course of the partnership business, executes and delivers in the name of the firm a promissory note in which all rights of homestead and exemption are expressly waived, the waiver is binding on all the members of the firm, so far as the personal property belonging to the firm is concerned, and no member is entitled to an exemption out of the money arising from a sale of such property by a duly-appointed receiver, as against a judgment or decree founded on such a note.—HAHN V. ALLEN, Ga., 20 S. E. Rep. 74.

93. PLEADING—Agency.—A complaint on a contract executed by an agent may, without more, aver its execution by defendant, the principal; and, the agency appearing from the copy of the note set out, authority to execute it is implied, and need not be expressly alleged.—GOETZ V. GOLDBAUM, Cal., 37 Pac. Rep. 646.

94. POWER OF ATTORNEY—Construction.—A power of attorney authorizing the agent to carry on a general mercantile business in a certain city, and to do all things necessary as fully as the principal might do, authorizes him to execute a note for the principal to settle a lien of a third person on cotton purchased by the agent.—WIMBERLY V. WINDHAM, Ala., 16 South. Rep. 23.

95. RAILROAD COMPANIES — Accident at Crossing.—One who attempts to pass between cars at a crossing, knowing that they have stood there longer than is permitted by ordinance, and in so doing puts a foot on either side of the pin head, where they will necessarily be caught if the train were moved, is guilty of contributory negligence.—HUDSON V. WABASH WESTERN RY. CO., Mo., 27 S. W. Rep. 717.

96. RAILROAD COMPANIES—Bridge over City Street.—The legislature may authorize a city to compel a railway company which has laid its tracks across a street, when public necessity requires it, to bridge the tracks at its own expense.—PEOPLE V. UNION PAC. RY. CO., Colo., 37 Pac. Rep. 610.

97. RAILROAD COMPANY — Combinations in Restraint of Interstate Commerce.—A combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining States until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof may be restrained by injunction, under section 4 of the act.—UNITED STATES V. ELLIOTT, U. S. C. C. (Mo.), 62 Fed. Rep. 801.

98. RAILROAD COMPANY — Electric Railroad — Negligence.—In an action against an electric street-car company for the death of plaintiff's minor son, evidence that the car was running somewhere between 11.96 miles and 17 miles per hour supports a finding that defendant was negligent in running the car at a greater rate than 12 miles per hour, to which it was limited by ordinance. —RILEY V. SALT LAKE RAPID TRANSIT CO., Utah, 37 Pac. Rep. 681.

99. RAILROAD COMPANY—Fires Set by Locomotives.—The presumption of negligence from grass being burned by sparks from an engine is one of fact, and it is error to charge that the scattering of sparks along the right of way of a railway is negligence.—GALVESTON, H. & S. A. RY. CO. V. KNIPPA, Tex., 27 S. W. Rep. 730.

100. RAILROAD COMPANY—Grant of Right of Way.—Where one conveys to a railroad company a right of way through his land, so as to cut off access to a part thereof, he has a way of necessity over the land conveyed.—NEW YORK & N. E. R. CO. V. BOARD OF RAILROAD COM'RS., Mass., 38 N. E. Rep. 27.

101. RAILROAD COMPANY—Injunctions against Combinations—Interstate Commerce—Jurisdiction.—Under Act July 2, 1890, declaring illegal and punishing combinations in restraint of commerce among the States, and conferring jurisdiction on United States Circuit Courts to prevent and restrain violations of the act, the court has jurisdiction to issue an injunction to restrain such violation.—UNITED STATES V. AGLER, U. S. C. C. (Ind.), 62 Fed. Rep. 824.

102. RAILROAD COMPANY—Liabilities as Lessee—Nuisance.—The present Western & Atlantic Railroad Company is liable, after notice to abate, for damages resulting from the continuance upon the right of way of the railroad of a nuisance placed there by the former company of the same name, while it had possession of the railroad, with the property appurtenant thereto, under lease from the State; and this is so although that company created the nuisance in question in making an effort to abate another nuisance, causing similar damages, of which complaint had been made by the plaintiff and others.—WESTERN & A. R. CO. V. COX, Ga., 20 S. E. Rep. 68.

103. RAILROAD COMPANY—Liability for Fire.—Defendant railroad company is not relieved from liability for its negligence in allowing its tracks to be strewn with bark and other inflammable matter, from which a fire was communicated to plaintiff's property, by the fact that it used the best appliances for arresting sparks.—TEXAS & P. RY. CO. V. ROSS, Tex., 27 S. W. Rep. 728.

104. RECEIVERS—Railroad Company.—Where a railroad company manages and controls another as part of its system, not through any contractual relation, but solely by virtue of its control of the voting power of the latter, which it absorbs by virtue of such power

and the latter is operated, not in the interest of its stockholders and creditors, but for the former's benefit, a receiver into whose hands both roads have passed, the latter as a part of the former, by virtue of such absorption, cannot recover from the latter expenses incurred in operating it.—PHINIZY V. AUGUSTA & K. R. Co., U. S. C. C. (S. Car.), 62 Fed. Rep. 771.

105. RECEIVERS—Validity of Contracts.—A contract made by an agent of a receiver, providing for the transportation of sheep without delay over the railroad which he represents, and over contiguous lines, not copartners, and without the jurisdiction of the court appointing such receiver, is void as against the receiver and such railroad, on the ground that under Sayles' Civ. St. art. 1464, enumerating the powers of receivers, such receiver cannot assume powers or risks not within the grant or control of the court whose agent he is.—INTERNATIONAL & G. N. R. Co. V. WENTWORTH, Tex., 27 S. W. Rep. 680.

106. REPLEVIN BOND—Construction.—Where a statutory bond is given in a replevin action, the provisions of the statute enters into, and become a part of the bond.—MULHALL V. MCVAY, Okla., 37 Pac. Rep. 604.

107. RES JUDICATA.—A plea setting up, in bar of a suit for an accounting by an administrator, judgments of a county Probate Court approving his accounts filed in that court cannot be sustained on evidence showing that, on appeals duly prosecuted from said judgments to a District Court, judgment was rendered disapproving and disallowing the accounts, and sustaining the objections thereto except as to commissions allowed. —APPELTON V. MARX, U. S. C. C. of App., 62 Fed. Rep. 638.

108. RES JUDICATA — Judgment on Demurrer.—Judgment rendered against a plaintiff on demurrer to his declaration because it does not aver a fact essential to a recovery, is no bar to a second suit by him on the same cause of action, wherein the declaration in stating the cause of action, avers the essential fact previously omitted.—CITY OF NORTH MUSKEGON V. CLARK, U. S. C. C. of App., 62 Fed. Rep. 694.

109. SALE.—The sale of a chattel is complete when the terms of sale are agreed upon, though the chattel is to remain with the vendor till paid for.—MONTGOMERY FURNITURE CO. V. HARDAWAY, Ala., 16 South. Rep. 29.

110. SALES — Action for Price.—It is no defense to an action for the price of stove patterns that the stove made after the pattern is patented.—LOWMAN V. EXCELSIOR STOVE-PATTERN CO., Ala., 16 South. Rep. 17.

111. SCHOOL DISTRICT — Capacity to Sue.—A school district has an interest in the subject-matter, and capacity to sue, in an action brought to restrain the county clerk from taking from the tax roll of such school district property which properly belongs to such school district for taxation.—SCHOOL DIST. NO. 74, KINGFISHER COUNTY V. LONG, Okla., 37 Pac. Rep. 601.

112. SCHOOL DISTRICTS—Liability to Garnishment.—A school district is not subject to garnishment under Code Civil Proc. § 542, authorizing the garnishment of any person indebted to a judgment debtor.—SKELLY V. WESTMINSTER SCHOOL DIST. OF ORANGE COUNTY, Cal., 37 Pac. Rep. 643.

113. SPECIFIC PERFORMANCE—Agreement to Sell Land —Statute of Frauds.—Where the property sold may be ascertained from the contract, and the consideration is expressed, the time of performance is immediately, the names of the contracting parties are given, and the contract is signed by the party to be charged therewith, the contract is sufficient.—HOMAN V. STEWART, Ala., 16 South. Rep. 35.

114. TELEGRAPH COMPANY—Loss of Prospective Sale —Damages.—The measure of damages for failure to deliver a telegram to the owner of cattle, from his agent, whereby an opportunity to sell the cattle was lost, is the difference between their market value at the place where they were at the time and the price for which they could have been sold.—WESTERN UNION TEL. CO. V. WILLIFORD, Tex., 27 S. W. Rep. 700.

115. TRESPASS — Title to Maintain. — The seller of goods on a conditional sale may maintain trespass, the time of payment having passed, against a sheriff who seizes the same under an execution against the buyer.—MANNING V. WELLS, Ala., 16 South. Rep. 23.

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118. WILL—Charities — Devise in Trust.—A devise in trust to establish free beds at the Middletown Hospital for the insane for female patients, the income in each year to be used under the direction of the trustee, creates a valid trust; and it is the trustee's duty to apply the income to the support in such hospital of such female patients as he may designate, and, at any time he may be unable to make arrangements with such hospital, to use it for the benefit of insane females possessing the requisites to entitle them to admission into such hospital, as nearly as practicable in the manner indicated by testatrix.—HAYDEN V. CONNECTICUT HOSPITAL FOR THE INSANE, Conn., 30 Atl. Rep. 50.

119. WILL — Distribution of Income.—Testator gave one-third of his estate to his wife, and the other two-thirds to his children, in certain proportions. The will provided that advancements made to the children were to be "embraced in the inventory," and to be deducted from each child's share: Held, that the income of the estate during distribution should be divided among the wife and children in proportion to the amount they would each have taken, computed at the time of testator's death, and not in proportion to each one's share in the estate, without considering the advancements to them. — APPEAL OF BLACKSTONE, Conn., 30 Atl. Rep. 48.

120. WILL — Testamentary Powers — Execution.—A married woman's will gave all her property to her husband, "during his natural life, to be by him managed and disposed of in whatever way may to him seem just and right;" and directed that all remaining at his death undisposed of by him should be divided among their children. Land which had belonged to their community estate was conveyed by him, after he had married again, his second wife joining, by a deed of trust to secure payment of money advanced to him, making no reference to the will, but particularly describing the land with *habendum* to the trustee, his successor or substitute forever, and covenant of warranty: Held, that the trust deed was a sufficient execution of the power declared in the will, and passed the entire title, and not alone the husband's estate in the land.—HENDERSON V, SMITH, U. S. C. C. of App., 62 Fed. Rep. 708.

121. WILL—Vesting of Estate.—Testator gave to his wife, for life, one third of his estate, with power to sell the land, with remainder to his two children; one-third to his daughter M; one-third to his daughter D, to be invested in securities, she receiving the income thereof necessary for her support until she is 23 years of age, "when she shall come in full possession of the same." D died before reaching 23, and devised all her property to her mother: Held, that D's one-third interest in her father's estate of which she had not come in possession, and also her interest in the property in which the wife had a life estate, passed to the wife.—HARRISON V. MOORE, Conn., 30 Atl. Rep. 55.

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